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Decisions

January 84



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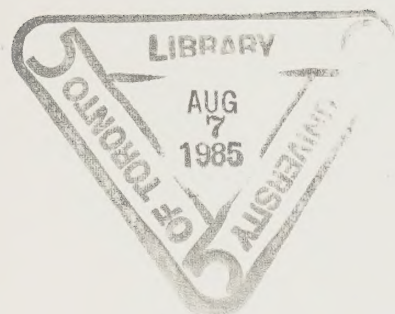
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**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

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Selected decisions of particular reference value are
also reported in *Canadian Labour Relations Boards
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2002-83-R Marc Dallaire, Applicant, v. Lumber & Sawmill Workers' Union, Local 2995 of the United Brotherhood of Carpenters and Joiners of America, Respondent, v. **Bois A. Lachance Lumber Limited**, Intervener

Practice and Procedure – Termination – Union failing to give notice to bargain within time limits after certification – No evidence of prejudice to employer or employees – Application for termination filed in haste – Union not sleeping on rights – Dismissed

BEFORE: Owen V. Gray, Vice-Chairman, and Board Members F. W. Murray and H. Kobryn.

APPEARANCES: *J. F. Gaetan Brisson, Marc Dallaire and Roger Lachance for the applicant and intervener; Paul Falzone and Raymond Boissoneault for the respondent.*

DECISION OF THE BOARD; January 23, 1984

1. This is an application pursuant to section 59 of the *Labour Relations Act* for a declaration that the respondent no longer represents the employees of the intervener for which it is the bargaining agent. Section 59 of the Act reads as follows:

59.-(1) If a trade union fails to give the employer notice under section 14 within sixty days following certification or if it fails to give notice under section 53 and no such notice is given by the employer, the Board may, upon the application of the employer or of any of the employees in the bargaining unit, and with or without a representation vote, declare that the trade union no longer represents the employees in the bargaining unit.

(2) Where a trade union that has given notice under section 14 or section 53 or that has received notice under section 53 fails to commence to bargain within sixty days from the giving of the notice or, after having commenced to bargain but before the Minister has appointed a conciliation officer or mediator, allows a period of sixty days to elapse during which is [sic] has not sought to bargain, the Board may, upon the application of the employer or of any of the employees in the bargaining unit and with or without a representation vote, declare that the trade union no longer represents the employees in the bargaining unit.

2. The applicant, Marc Dallaire, is a lumberjack. He works for Bois A. Lachance Lumber Limited ("Bois Lachance") in its woods operation. Bois Lachance is a family operation in which three Lachance brothers are engaged: Roger, Gaetan and Remi. The woods operation of Bois Lachance is active in the winter months. The wood cut during that operation is taken to the Bois Lachance mill in Harty, Ontario, where the wood is processed during the summer months. Some Bois Lachance employees work just in the mill, some work just in the woods operation and some work in both. Dallaire just works in the woods operation. This is his third winter working for Bois Lachance.

3. Around the end of August, 1983, Remi Lachance telephoned Dallaire and asked him to report to work in the woods operation on September 19th. Before he started work, Dallaire heard rumours that a union had come in at Bois Lachance. A few days after he started work, he asked Remi Lachance whether that was true. Lachance said it was. Lachance was not happy about that, and made his feelings known to Dallaire.

4. On September 29th, Dallaire heard there was to be a meeting that evening. It had been called by the union. He understood it was only for the men working in the mill. He was told all this by a friend who is not employed by Lachance and was not present at the meeting. Dallaire does not know how his friend knew about the meeting. He did not attend the meeting, nor did he later approach any of the mill employees to find out what had happened there. He did, however, go to a lawyer. He did so, he told the Board, because he did not want to work under the conditions of a union. At around this time, Dallaire received a typewritten document which has a preamble in English and French. The English preamble reads:

We, the undersigned employees of Bois A. Lachance Lumber Limited, concur in the application of Marc Dallaire for a declaration terminating the bargaining rights of the Lumber & Sawmill Workers' Union, Local 2995.

Dallaire at first testified he received this document from the company secretary. He later testified he received it from his lawyer. What he received from the company was a list of employees.

5. Dallaire waited until November 20th, a Sunday, to see the employees on the list to get their signatures on the document. He got eight signatures that day. Six were of employees, including laid-off employees, of Bois Lachance. One was the signature of the wife of a laid-off Bois Lachance employee. The other was the signature of another member of the family of that employee. These last two signatures were later crossed out. One of the signatures he got on Sunday was the signature of Gaetan Lachance. Dallaire got five more signatures on Monday, November 21st, including the signature of Remi Lachance. On Tuesday or Wednesday he got the signature of the person whose other family members had signed on Sunday.

6. The document bearing these signatures was mailed to the Board along with Dallaire's application. The application is completed in English and signed by Dallaire. Dallaire does not speak English. He thinks the document was translated to him by his lawyer before he signed. Paragraph 5 of the application reads:

THE UNION HAS NOT GIVEN NOTICE OF ITS INTENT TO BARGAIN AND HAS NOT COMMENCED TO BARGAIN WITH THE EMPLOYER. ALL EMPLOYEES WHOSE NAMES AND SIGNATURES APPEAR ON THE SCHEDULE ATTACHED HERETO CONCUR IN THIS APPLICATION.

Dallaire testified that by the time he signed this application he had not asked anyone whether the union had sent any letter or notice to his employer asking the employer to bargain. Asked

how he knew that paragraph 5 was true when he signed the application, Dallaire then said he had been talking about that off and on with Remi Lachance.

7. On September 14, 1983, the respondent trade union was certified as the bargaining agent for a unit of employees described as follows:

All employees of Bois A. Lachance Lumber Limited at its Sawmill and Planing Mill in Harty, Ontario, and its Wood Operation in the District of Cochrane, save and except foremen, those above the rank of foreman, sales and office staff.

At the time the certification application was made, there were no employees in the woods operation. The woods operation was included in the bargaining unit by agreement of the parties, and granted by the Board on the parties' explanation that certain of the sawmill employees customarily transferred to the woods operation during the winter months. There were 13 or 14 employees in the bargaining unit on the date of the certification application. Two of the employees were Remi and Gaetan Lachance, whom the union did not then challenge as "managerial". The union received its certificate September 20, 1983. Raymond Boissoneault, Vice-President of the union, then sent letters to all the employees in the bargaining unit other than the Lachance brothers, whose presence Boissoneault thought would be inappropriate. The union had the addresses of all those employees as a result of its organizing campaign. The letter informed them of a union meeting to be held September 29, 1983. All or nearly all of the invited employees attended the meeting. Boissoneault chaired the meeting. He explained to the employees the way the union operated and what a collective agreement was, and discussed the sort of terms and conditions usually covered by a collective agreement. While these matters might normally have been covered in the course of an organizing campaign, the campaign to organize these employees had been very brief because in this case the employees had invited the respondent to organize them. After this introduction, Boissoneault sought and obtained from the employees information with respect to their work place, working conditions, wages, benefits and so forth. He asked them about the woods operation. He was told the names of approximately four persons who normally transferred from the mill operation to the woods operation, as well as the names of other employees who were regularly hired to work just in the woods operation. The employees present who expected to transfer into the woods operation thought they would be starting shortly, but did not have a firm date. There was a rumour that the company might be ceasing its woods operation. Information about the woods operation was indefinite. The employees still at work in the mill had been given notice that they would be laid off within the week following the meeting. Based on past experience, the employees did not expect the mill to open again until the following April.

8. The respondent and its sister Local, Local 2693, represent the employees of other sawmills and woods operations in Northern Ontario. Boissoneault used an agreement the respondent has with an employer in the Hearst area as an example in explaining what the union would look for in negotiations with Bois Lachance. He told the employees, however, that the negotiations the union and its sister Local would soon be starting with certain employers in the Hearst area normally set the pattern for other settlements with employers whose employees were represented by those Locals. This had been the *modus operandi* of these two Locals for 10 years. Boissoneault advised the employees that it would be to their advantage to have negotiations with their employer wait until the pattern settlement had been obtained. The employees agreed. They were in no rush.

9. At the September 29th meeting, the employees present elected one Elie Fortin as the employee bargaining committee representative, with the expectation that he might later be selected as shop steward once the employees had a collective agreement. Boissoneault told Fortin he would let him know when dates had been set for negotiations. The meeting ended. One of the employees, Denis Marchand, stayed behind to speak to Boissoneault about a problem. Prior to the shutdown of the Lachance mill, he had requested and been granted a layoff because he had found other employment. Bois Lachance had then given him a separation certificate which stated that he had quit. Marchand felt the certificate should have shown he had been laid off. On October 5, 1983, Boissoneault wrote to Bois Lachance about this. Bois Lachance received the letter, but did not reply. Boissoneault heard nothing further from Marchand about his complaint. There was no further or other written or oral communication between the union and Bois Lachance at any material time after certification. No written notice to bargain was given in the time frame stipulated in section 59(1) of the Act, and no bargaining took place.

10. After the September 29th meeting, Boissoneault kept an eye on the Bois Lachance mill, which he drove past on his regular trips to and from Hearst. He was looking to see if lumber was arriving at the mill, which would have been a sign that the woods operation had commenced. He saw no such sign and received no communication either from the company or from any of its employees until this application was filed. Fortin, who was one of the employees expected to transfer to the woods operation, had not started to work in the woods operation until November 21st. Prior to being served with this application, Boissoneault was unaware of Dallaire's start in the woods operation on September 19th, or that Dallaire had been joined by others in mid-October.

11. The purpose of section 59 of the *Labour Relations Act* was explained in the *Dominion Stores Limited*, 56 CLLC ¶18,047 in the following terms:

The purpose of section 43 [now section 59] of the Act is to protect the employees and, in a proper case, the employer against a union which stakes out a claim to represent certain employees and then takes no steps within a reasonable time to forward the interests of those employees. However, the section is to be used as a shield, not as a sword. Section 43 should not be used to penalize a union which has failed to give notice under section 10 [now section 14] of the Act, but rather to afford an opportunity for an interested party to bring that fact to the attention of the Board so that the Board may call upon the union to give an explanation for the delay in commencing or continuing negotiations as the case may be. If no satisfactory explanation is forthcoming, the Board will no doubt in many cases terminate the bargaining rights of the union instantaneously.

The concern addressed by the section is the prejudice which may be caused to the employees, or to the employer, when a trade union sleeps on its rights: *Walmer Transport Co. Ltd.*, 53 CLLC ¶17,062; *Yarntex Perth, Division of Yarntex Corporation Limited*, [1975] OLRB Rep. Feb. 137. While an incumbent union holds exclusive bargaining rights, section 67 of the Act prevents both the employees and the employer from dealing with each other directly or through another bargaining agent more willing or able to act. While in applications under section 57 of the Act the focus of concern is on the desire of employees for continued representation by

the incumbent trade union, the focus of section 59 is the continued willingness or ability of the incumbent to bargain on behalf of the employees. It is not the purpose of section 59 to afford an opportunity, particularly to an employer, to re-determine the wishes of employees outside the time periods provided for in section 61 of the Act: *Prescott Machine and Welding Inc.*, [1982] OLRB Rep. Feb. 250.

12. The failure of a trade union to reply to or attend at the hearing of an application under section 59 is the best evidence of circumstances to which that section was intended to be responsive, and will lead to a granting of the application: *Darrigo's Supermarkets Ltd.*, [1982] OLRB Rep. Jan. 32; *Fuller's Restaurant*, [1981] OLRB Rep. Feb. 156; *Canwood Lachute*, [1979] OLRB Rep. Dec. 1140. Where the trade union demonstrates its continued desire to represent employees by coming forward with an explanation which the Board nevertheless finds unsatisfactory, the Board may exercise its discretion to order a representation vote: *Moyer Sand (1965) Limited*, [1966] OLRB Rep. Mar. 913; *Kap Imperial Service Station*, [1969] OLRB Rep. Feb. 1186. Any number of circumstances may satisfactorily explain a trade union's delay in commencing or continuing collective bargaining. For example, the Board will not act under this section to terminate a trade union's bargaining rights with respect to a bargaining unit in which there are no employees: *BLH - Bertram Ltd.*, [1967] OLRB Rep. Oct. 652; *Scarborough Public Library Board*, [1968] OLRB Rep. May 196; *International Harvester Company of Canada, Limited*, [1972] OLRB Rep. July 762; *Yarntex Perth, Division of Yarntex Corporation Limited*, *supra*. A trade union's failure to give notice to bargain for the renewal of a collective agreement may be satisfactorily explained if the union establishes that it was carrying out the wishes of the employees affected: *Nurses' Association St. Mary's General Hospital Kitchener*, [1971] OLRB Rep. Sept. 556. The Board will consider the length of the delay: *F.C.M. Construction Limited*, [1982] OLRB Rep. May 670. The "haste" with which the applicant has brought the application is also a relevant consideration: *Holley Electric Ltd.*, [1965] OLRB Rep. May 136; *Grant Ready Mix Limited*, [1967] OLRB Rep. Dec. 892.

13. A trade union may delay bargaining intentionally, in order to develop its bargaining strategy with respect to a number of employers or to conclude with other employers a "pattern settlement" on which bargaining demands may thereafter be based. The Board has usually recognized the *bona fide* existence of such an intention as a reasonable explanation for delay: *Holley Electric Limited*, *supra*; *Moyer Sand (1975) Limited*, *supra*; *Muskoka Ambulance Service*, [1974] OLRB Rep. Sept. 590; and, *Trizec Equities Ltd.*, [1978] OLRB Rep. Feb. 189 (but see *Kap Imperial Service Station*, [1969] OLRB Rep. Feb. 1186).

14. The unusual and disturbing feature of this case is the total failure of the respondent to give the intervener employer any notice, whether written or otherwise, of its desire to bargain for a first collective agreement or its intentions with respect to bargaining. The union's disdain of communication with this employer is an inauspicious start to a collective bargaining relationship. We observe that communication with the employer might have answered the questions on which Mr. Boissoneault remained uncertain at the conclusion of his meeting with employees of September 29, 1983. Mr. Boissoneault could, for example, have asked the employer when the woods operation was expected to start and who was employed in it once it did. The timing of negotiations could and should have been discussed with Bois Lachance at an early date.

15. While the respondent's approach to communication with the intervener leaves something to be desired, we balance against that the fact that the intervener made no complaint

about the respondent's approach to negotiation. Although Roger Lachance was present at the hearing in this matter, he was not called to testify and there is no evidence before us that the intervener was prejudiced by the respondent's delay in giving notice to bargain or commencing bargaining. Indeed, because no one was called on behalf of the intervener, we have no way of knowing whether the intervener was aware of the respondent's meeting with its employees and, if so, how much it learned about the bargaining strategy approved by the employees present at that meeting.

16. We are not satisfied that the respondent's delay in giving notice to bargain or commencing bargaining prejudiced employees. Indeed, it is uncontradicted that the employees present at the meeting of September 29, 1983 agreed with the respondent that its approach was appropriate in the circumstances. Employees who came on the scene later made no effort to convey any contrary view to the union.

17. Considering all the circumstances, including the haste with which this application was brought, we are satisfied that the respondent has not slept on its rights and that this is not an appropriate case either to terminate bargaining rights or to order a representation vote. It is therefore unnecessary for us to consider whether the applicant's 'petition' represents a voluntary expression of desire of a number of employees sufficient to lead us to dispense with a representation vote.

18. This application is, accordingly, dismissed.

0064-83-U John Cooper, Complainant, v. International Brotherhood of Painters and Allied Trades, Local 1590, and Ronald Last, Respondents

Duty of Fair Referral – Practice and Procedure – Unfair Labour Practice – Job assignment not according to position on list alone – Other factors taken into account – Wide discretion given union official not arbitrary where no abuse shown – Complainant not entitled to revive allegations in previous complaint settled

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members J. W. Murray and H. Kobryn.

APPEARANCES: *Brian Iler and John Cooper for the complainant; A. M. Minsky and R. Last for the respondents.*

DECISION OF THE BOARD; January 12, 1984

1. John Cooper is a painter. In March, 1983, he was unemployed. There were job openings at Bagwell Coatings where Cooper had worked before, but other out-of-work union members were referred to these positions. Cooper complains that the union's failure to refer him to one of these jobs constitutes a breach of section 69 of the *Labour Relations Act*. That section reads as follows:

69. Where, pursuant to a collective agreement, a trade union is engaged in the selection, referral, assignment, designation or scheduling of persons to employment, it shall not act in a manner that is arbitrary, discriminatory or in bad faith.

2. This is not the first section 69 complaint that Mr. Cooper has filed. On May 7, 1982, he filed a similar complaint in which he also alleged that the union had wrongly failed to refer him to a job opening at Bagwell Coatings. That complaint was resolved in accordance with minutes of settlement which read as follows:

WHEREAS the Ontario Labour Relations Board ("the Board") has dismissed that portion of the above complaint under section 89 ("the Complaint") of *The Labour Relations Act* R.S.O. 1980 c.228 ("the Act") dealing with alleged irregularities in the specially called meeting dealing with the merger of Locals 1783 and 1590 of the International Brotherhood of Painters and Allied Trades;

AND WHEREAS the Complainant John Cooper ("Cooper") has withdrawn that portion of the Complaint dealing with a violation of section 68 of the Act for allegedly failing to file a grievance on his behalf with respect to the rate of pay paid to foremen;

The parties to the Complaint, without any admission of guilt or wrongdoing on anyone's part, each agree with the other to settle the remaining portion of the Complaint as follows:

(1) International Brotherhood of Painters and Allied Trades, Local 1590 ("the Union") shall administer its system for the referral of members to employment in accordance with Section 69 of the Act;

(2) The Union agrees that the "out-of-work" list and other supporting documents shall be made available for reasonable inspection by its members during regular Union office hours;

(3) Cooper may present any proposals for the amendment of the Union's system for the referral of members to employment in accordance with the Bylaws and Constitution of the Union and such proposals shall be dealt with in accordance with the Bylaws and Constitution of the Union;

(4) The foregoing represents full settlement of the remaining portion of the Complaint and accordingly the Complaint is withdrawn.

These minutes of settlement were incorporated in a Board decision issued on October 22, 1982.

3. Before turning to the specifics of Mr. Cooper's complaint, it may be useful to comment briefly upon the nature of a union "hiring hall" - a work allocation mechanism which is quite common in the construction industry. The purpose of the hiring hall was succinctly

described in *Joe Portiss and Labourers' International Union of North America, Local 1089 et al.*, [1983] OLRB Rep. July 1160 at page 1161:

6. The hiring hall is a significant component in the administration of employment in the construction industry. Before the advent of unionism employment in the construction industry was not methodical, often being governed at the whim of employers and their personnel agents. Without the hiring hall employees, notably in the construction industry and the maritime industries, were too frequently the victims of abuse and arbitrary treatment at the hands of employers. (See, generally *Hearings On Hiring Halls In The Maritime Industry, Sub-Committee On Labour Management Relations Of Senate Committee On Labour And Public Welfare*, 81st Cong. (2d) ses. 100-01 (1950) and Bastress, "Application of a Constitutionally Based Duty of Fair Representation to Union Hiring Halls" [1982] *West Virginia Law Review* 31). If they are operated fairly hiring halls provide an equitable and efficient means to distribute jobs, particularly in industries where jobs are temporary and manpower needs fluctuate. In these situations the union is well suited to act as an employment agency.

7. The hiring hall offers advantages to both employees and employers. It saves the employee from the need to canvas numbers of employers in an often fruitless search for work, acting as a clearing house in which available jobs and available workers can be matched. Particularly in periods of high unemployment it also provides the worker with a rational and objective system for the more equitable distribution of work among all employees rather than the privileged few. The employer gains to the extent that the hiring hall relieves him of the need to screen and recruit employees with adequate qualifications for short term jobs. The employer avoids the administrative cost he would otherwise bear as well as incidental costs which he might have to incur to retain a crew of workers through slow periods to insure available manpower in busier times. A well run hiring hall will give the employer a ready pool of labour from which he can draw on short notice with little or no administrative cost. Moreover, to the extent that the hiring hall dispatches the same members to different kinds of jobs for different employers, as is notably the case for labourers, it may engender a work force with greater experience and sophistication, which will also benefit the employer.

8. To the extent that the hiring hall functions as an employment agency it vests considerable power in the hands of union officers in charge of its management. Through the administration of hiring hall rules, including the determination of qualifications and classifications of employees, the union officer in charge of a hiring hall has a substantial degree of control over the employment opportunities of union members. The hiring hall system effectively vests in those union officers powers and prerogatives which were previously associated with an employer. Control over the employment opportunities of hundreds, and sometimes thousands, of union members involves the exercise of a considerable amount of power

over their lives. By the enactment of section 69 of the Act the Legislature introduced certain minimal safeguards against abuse of that power.

This description is equally applicable to the hiring hall operated by the respondent union, and, as will be seen, it is the functioning of the hiring hall that is at the heart of this case.

4. The hiring hall of Local 1590 is currently run by Ron Last, its financial secretary and business manager. He is elected by the Local membership and has held his position since 1974. Before that, he held other union offices while still working "at the tools" like the other members of the Local.

5. Last testified that when he took over in 1974, the hiring hall was largely a misnomer. In his view, the system was riddled with abuses and did not operate as a very efficient or equitable mechanism for distributing work opportunities. Unemployed members regularly sought their own jobs, bypassing the hiring hall altogether, and applying only later for a union referral slip. In this way, they were able to gain precedence over union members who might have been out of work longer, and of course, this merely encouraged employers to hire individually and disregard the hiring hall. Some employers had developed a practice of requesting employees by name – again passing over capable employees who might have been out of work longer, or have a better equitable claim to the work. Some union members used the hiring hall to secure employment while continuing to solicit alternative work on their own. These members would then quit, and seek a union referral slip, bypassing other out-of-work members, and annoying the employers to which they had been initially referred.

6. All of these practices undermined the hiring hall, and when Last assumed office, he sought to discourage them. But he did not always get the full co-operation of his membership. When he sought to introduce a more formalized classification of employee skills, some members cavalierly claimed to be skilled in all phases of the painting trade – when Last knew that they were not. A system whereby individuals were asked to list their qualifications quickly broke down. Thereafter, Last has relied upon his own personal knowledge and investigation of the members' capabilities.

7. The painting trade is not as simple or unskilled as one might at first assume. There are, of course, ordinary brush painters who need no particular training, but there are also a number of specialties. There are skilled sandblasters, spray painters, and employees trained in the application or handling of particular compounds and coatings. There are employees who specialize in hanging expensive vinyl wall coverings or doing commercial interiors. Still others are prepared to work outside, exposed to the elements, on catwalks or suspended platforms painting the stacks and piping systems common in Sarnia's "chemical valley".

8. The painters also have personal preferences and, insofar as possible, they want the job allocation system to accommodate them. There are companies they like and those they dislike. There are foremen with whom they get on well, and foremen whom they try to avoid. No one is anxious that members should go back to a company where there were problems, or from which the employee had previously been fired. As Last put it, he would simply be "asking for trouble" from both his members and the employers. Nor is there any evidence that anyone, other than the complainant, has ever wanted a "strict list" or "first in, first out" system. On the contrary, all of the witnesses were adamant that they do *not* want jobs to be allocated on a strict rotation basis. Indeed, even the complainant was equivocal about this.

The fact is, that a strict list system is not desirable from the members' point of view, and would be unworkable given the variation in employee skills and abilities.

9. In Lambton County there are four major painting contractors: C. H. Heist, Bagwell Coatings, K. L. McCormack, and Harkness and Waters. They are the principal employers of the union's members, however, their demand for labour is highly seasonal. It begins in the spring, as weather conditions improve, peaks in the summer, and declines sharply in late November or December with the onset of cold weather. At that point, the bulk of the work force will be released and is likely to remain out of work until painting activity picks up again in the spring. The overall level of activity and employment, of course, depends upon general economic conditions. In 1982 some union members did not work at all.

10. Ron Last testified at some length about the criteria which he applies when referring unemployed members to work. The process begins with a request from an employer for a particular number of employees having specified skills. However, there will generally be more workers available than there are job openings, and when this is the case, Last must decide which of them will be referred and which of them will have to wait. He takes into account such factors as: whether the individuals have the required skills and abilities; whether they have expressed a preference for or against this type of assignment; the length of time they have been unemployed; whether their unemployment insurance benefits have expired; whether they are on welfare, or are suffering particular hardship by reason of family circumstances (age, illness, parental responsibilities, etc.); whether they have been able to find work or are working outside the trade; whether the job is short term or long term, whether further hirings are anticipated, and whether the individuals available have expressed any particular interest in or antipathy to the company making the request or the supervisors with whom they will have to work. Last testified that he tries to meet the employers' requirements, accommodate the preferences of the membership, and distribute work in an equitable manner.

11. Last pays special attention to the employees' past work record, if any, with the company making the request. A number of employees have established themselves with a particular company and go back year after year. In effect, they have steady employment with a seasonal layoff, cushioned by unemployment insurance benefits. Last makes an effort to maintain the continuity of these relationships and to reassemble the previous year's crew.

12. The practice of returning the same crew is of considerable advantage to employers and employees alike. The employers know that, by and large, they will be able to get back their core or key people who are known to be reliable and familiar with the company's equipment. Employees who have worked for a particular company over the years know they will return to familiar circumstances. In any event, to meet these employer and employee desires, Last determines which of the out-of-work members have worked for the company in the previous year and, in addition, whether they have worked for one or more years before that so as to have an established relationship with the company making the request. If they have, Last makes an effort to assemble the same crew as the company had in the previous painting season.

13. All of these factors must be balanced as each referral is made, and obviously there is a considerable latitude for discretion and the exercise of judgment. That discretion is recognized and authorized by the Local union's bylaws which currently read as follows:

(h) REFERRAL SLIPS

1. All members must receive a referral slip from Local 1590 before reporting to work for any signatory to our Agreement.
2. Any member going on a job for any signatory to our Agreement without first obtaining a referral slip from Local 1590 shall be subjected to a fine of \$150.00 dollars.
3. Members referred to jobs of five days duration or less will not be removed from their place on the list of unemployed.
4. Members refusing to comply with the above Sub-Section 3 without good reason shall be moved to the bottom of the list of unemployed. Discretion to be used by the Business Representative in carrying this out.
5. The hiring system that Local 1590 will use is as follows:

Members who have established themselves with a company could [sic] return to that company when it starts hiring again, but, all hiring would [sic] be left to the business agent's discretion.

The operative provision, section (5), was passed in that form at a specially-called meeting held for that purpose in March 1983. There was a large turnout of union members, the bylaw was passed overwhelmingly, and there was a thorough discussion of the way in which the hiring hall had traditionally operated – although, not all of the employees may have understood that process and there were obviously those who were opposed to vesting such wide discretion in the business agent.

14. However, the bylaw did not alter the way in which the hiring hall was run. It merely ratified the status quo. For some years, referrals have been made, in the business manager's discretion, based upon a variety of factors, including those set out above. The passage of the bylaw merely amounts to an endorsement of the existing practice.

15. Nevertheless, it was clear from the evidence of the complainant's witnesses that there was and remains some confusion on their part, as to how the hiring hall has been run in the last couple of years, and, in the absence of more detailed written rules, clearly spelling out the criteria which Last applies when making job assignments, the Local union leaves itself open to uninformed allegations of impropriety simply because its members do not have a clear understanding of the factors taken into account when deciding who should be referred to particular jobs. On the other hand, we are constrained to note that the misconceptions of the complainant and his witnesses cannot be attributed solely to the absence of detailed hiring hall rules or to any conduct on Last's part. It was apparent that they were quite prepared to transform their uninformed suspicions, conjecture, personal animosity and speculation into a conclusion that there had been misconduct, while at the same time making little effort to investigate their complaint or seek a resolution through established internal union channels. Had the complainant made even minimal enquiries about the way in which the hiring hall operated, this entire proceeding, with its attendant expense to all concerned, might well have

been avoided; nor is there much to indicate that Last extended any great effort to explain things to Cooper. Litigation is a rather expensive and time-consuming way to secure or convey information.

16. The complainant testified that he was *certain* that after March, 1982, the hiring hall was operated on a "strict list", "first in, first out" system. He testified that he came to this conclusion after a casual perusal of some of the out-of-work lists posted in the union hiring hall. He said that he observed that people were being struck off near the top of the list and assumed that Last was applying a "first in, first out" principle.

17. There is no basis whatsoever for this conclusion. The hiring hall lists in question were put in evidence before the Board and it is evident that members' names were also being struck out (i.e., they were referred to work) lower on the list. Whatever referral formula was being applied, it was obviously not a strict list system and the complainant would have realized that had he been more careful in examining the posted list or taken the trouble to investigate or ask Ron Last about it. But he did not. He testified that he never checked the out-of-work lists in any detail, he never requested or considered the supporting documents, he never asked for an explanation from Last about how the hiring hall worked, and he never raised the matter at a union meeting. He made no effort to check his present allegations even though the settlement of his earlier complaint expressly acknowledges his right to peruse all of the union's documentation respecting the operation of the hiring hall as well as his right to propose changes. The complainant did neither. Instead, he filed this complaint.

18. The complainant's witnesses, while sharing his antipathy to Mr. Last, were equally uncertain about how the hiring hall has been run over the years, and, like the complainant, had made little or no effort to find out. Albert Shaw was sure that Last was acting improperly and testified that he would never trust Last no matter what he said. But Shaw testified that he never uses the hiring hall, he has never registered as unemployed, he has never collected unemployment insurance, and has never been placed upon or relied upon the union's out-of-work list. He was sure that during the 1982 painting season, the hiring hall was operated on a first in, first out basis (which it was not), but he had no foundation for this belief other than what Mr. Cooper may have told him. Shaw was not active in the union's affairs. In Shaw's opinion, union meetings "don't mean nothing" and he didn't bother going to any.

19. Robert Moore was equally sure that, until recently, the hiring hall was operated on the basis of what he described as a "six-man rule": a company could request six individuals by name, then thereafter referrals were made on a one for one basis in which the employer would choose one employee by name, then the union would select one from the out-of-work list. Moore testified that he "would lay odds" that the system he described was expressly set out in the collective agreement. It isn't; and there is no evidence that in recent years such system has ever been ineffect. Moore was also of the opinion that after March, 1982, the hiring hall was operated on a strict list system. It wasn't; nor is there any apparent basis for that particular misconception except Mr. Cooper's unfounded speculation.

20. When pressed in cross-examination, the complainant's witnesses also indicated some awareness that factors other than employee skills or employment history could affect job referrals. They admitted that, historically, the hiring hall has not been operated on a strict list, first in, first out basis. Moore complained that some years ago, before Last's time, the business agent had taken into account such factors as the members' unemployment insurance status

and their family responsibilities. Moore was annoyed that an unemployed worker with a number of children had been referred to work before he was. The complainant admitted that, historically, the union had considered the fact that a member's UIC benefits had expired, and whether he was a foreman, or had an established relationship with a particular company. His present complaint as initially framed (but later abandoned) was that he had not been referred to Bagwell *as a foreman*. On cross-examination, he also indicated that prior to 1982, he had no concern about the way in which the hiring hall was operated or the referral of members to employers with whom they had an established relationship. That had worked to his advantage before, and it was only in 1982, when he was not referred back to Bagwell, that he had a complaint. In that case, it was not a departure from a first in, first out system that he complained about, but rather that, as a previous employee of Bagwell, he had not been sent back. It is also admitted that if Last had applied a strict list system to the impugned referral, in 1983, the complainant still would not have been sent to Bagwell. The complainant's testimony as to the system he wanted in place was somewhat confused, but giving it its most generous gloss, would suggest that he was content with referrals being based upon a variety of criteria, including list position, qualifications, and whether the individual had established himself and worked for the requesting company during the previous painting season, provided it resulted in a referral to his preferred employer.

21. The union does, in fact, maintain an out-of-work list, members' names do appear on that list in sequence, the list is considered when referrals are made, members' names are struck off when they go to work, and their names are put on the list again, at the bottom, when they report to the union that they are seeking work. Over time, names will appear to move up the list as those ahead of them are referred out. But list position is *not* determinative in the allocation of jobs. One cannot assume that someone higher on the list will necessarily be referred out before someone lower down. It depends upon a number of factors, including: the individual's skills, whether the individual and those below him were part of last year's crew and had worked for the company prior to that; whether they were running out of unemployment insurance benefits or on welfare, or suffering special hardships; whether they had an expressed preference for a particular company or were prepared to wait a little longer until their favourite appeared; whether the job was a relatively short one so as to appear unattractive when compared with continued idleness on unemployment insurance; and whether, although appearing on the top of the list as an out-of-work painter, the member had in fact been able to secure alternative employment outside the trade, thereby making his claim less pressing; and so on.

22. The out-of-work list only shows union members not presently working in the painting trade. Persons on the list are not necessarily out of work altogether; moreover, it would appear that employees who maintain their membership in the union remain on its rolls and can "opt in" to the hiring hall upon notifying Last that they are again seeking work as painters. They would then be referred on the basis of the functional and equitable criteria set out above. In addition, there will occasionally be new members or transferees from other locals who will be added to the out-of-work list and given a share of available work opportunities. Finally, there will be individuals who do not lose their list position, even though they are referred to jobs of short duration, on the theory that one, two or even a few weeks' work does not make up for a long period of unemployment. Last testified that the "five-day rule" for short jobs specified in the Local's bylaws (see *supra*) has never been applied in practice, and that he would face considerable opposition from the membership if he sought to do so. And, of course, there will be those who prefer their unemployment insurance benefits to these

short-term jobs and would strenuously object to any penalty being imposed while they await referral to their favoured positions. Given the well-entrenched practice of accommodating these preferences, one cannot fault Last for trying to do so – regardless of the bylaw.

23. The order on the out-of-work list will not coincide precisely with the order that employees sign in the registration book kept at the union hiring hall. The registration book is maintained primarily for unemployment insurance purposes. By signing it, a member avoids the UIC requirement of providing concrete evidence of job search. Members normally sign in as soon as they are laid off, but they do not always do so. Sometimes they telephone to advise of the date of layoff and sign the unemployment insurance registration book some days later. Further, persons going to alternative employment (for example, one individual works for the Highway Department during the winter while on layoff from the painting trade) or someone transferring from another local may not appear in the registration book at all. Persons working elsewhere, but retaining their union membership and desiring to return to the trade, will not appear in the registration book but may well appear on the out-of-work list.

24. Last was cross-examined at some length about alleged discrepancies between the order of names in the registration book and on the out-of-work list, as well as the reasons why, in the past, particular individuals (other than the complainant) were referred to work before others. Sometimes Last was able to advance an explanation and sometimes he simply could not recall. But we do not attach much weight to this testimony one way or the other. There was no allegation of impropriety in respect of any of these individuals, and their names were not particularized in advance of cross-examination. One could hardly expect that, some months later, Last would be able to recall with precision the factors and individuals considered in filling a particular request for workers. At the time there was no requirement or reason to keep notes of the reasons why particular persons were or were not referred instead of others, nor any reason why Last should remember all of the factors influencing his discretion. Last's memory may be fallible but one would not have expected anything else in the circumstances.

25. With this general background, we turn to the specific job referral of which Mr. Cooper complains.

26. On or about March 18, 1983, Bagwell Coatings requested eight workers. Last sent them. No objection is taken by Mr. Cooper to the dispatch of three members above him on the out-of-work list; however, he asserts that the sending of the five individuals below him indicates a breach of section 69 of the Act. This argument is advanced on the premise that precedence on the out-of-work list (i.e., an earlier layoff date) should imply a favoured position when new work opportunities arise. However, as we have seen, the hiring hall system does not work that way. Nor did it in this case.

27. Upon receipt of the request from Bagwell for eight employees, Last scanned the out-of-work list and selected five qualified individuals who had worked for Bagwell in the 1982 painting season, had been laid off on or about December 22, 1982, and were desirous of returning to work with Bagwell in March, 1983. Each of these individuals had also worked for Bagwell in 1981, and some have been employed in prior years as well. In contrast, the complainant had not worked for Bagwell during the 1982 painting season. He had not been part of the 1982 crew. In Last's opinion, the five individuals sent each had a better claim for referral than the complainant, since they were both "established" with Bagwell and had been part of the 1982 crew.

28. There were three employees ahead of Mr. Cooper on the out-of-work list who were sent to Bagwell. Mr. Taylor was number one on the list, had run out of unemployment insurance benefits, had not worked at all in 1982, and had suffered the effects of an unfortunate accident. Mr. Bromberg was number two on the list, had not worked at all in 1982, and was penniless. Mr. Huggett had not worked in 1982, had been forced to seek work outside the trade in 1983, and, in Last's view, had a superior claim to those above him on the list. In each case the unemployed member had what might be termed an equitable claim to the available job and, on an objective basis, it is not unreasonable for Last to have sent them.

29. We detail the circumstances of these three members only for the purpose of completeness. The complainant makes no objection to their referral. They were above him on the list. But even in their case the list was not determinative. These referrals illustrate the efforts of Last to accommodate the particular problems of the members he is elected to represent.

30. Much testimony was advanced on behalf of Mr. Cooper in an effort to establish that Last had a particular antipathy towards him which, it is argued, influenced the decision not to refer him to Bagwell Coatings in 1983. We do not accept that proposition. We do not doubt that, in Last's view, Cooper was an annoyance who made uninformed and ill-founded allegations, was prepared to bypass internal union procedures, and was prone to "run to the Labour Relations Board" with his complaints without adequate investigation or any effort to resolve them at the Local level. Nor do we doubt that, in the circumstances, Last may well have made some intemperate or ill-advised remarks. He may well have suggested, for example, that Cooper should not be or did not deserve to be a union member, or even that he (Last) would prefer that Cooper were out of the union. However, these remarks must be put in context. Last was angry by what he believed to be a groundless attack on his integrity, launched without any effort to even discuss the matter with him prior to initiating litigation. Whatever his personal faults may be, Last honestly (and not unreasonably) believes that he has been wrongly accused to the detriment of his personal reputation and the funds of the Local union which must be expended in the union's defence. In any event, we are not satisfied that any personal animosity which Last may have had for the complainant influenced the 1983 referral to Bagwell, nor are we satisfied that Last was influenced by the fact that Cooper ran against him in the last election. We accept Last's evidence that he never considered Cooper to be a threat, and the election results would seem to bear out that assessment.

31. The complainant argues that he was just as "established" as the other persons referred to work at Bagwell in 1983, and that he should not be "penalized" because of what he characterizes as an "illegal" failure to refer him to Bagwell in 1982. The complainant asserts that, but for the failure to refer him to Bagwell in 1982 (which gave rise to the first section 69 complaint), he would have been in a pre-eminent position for referral in 1983 - having worked for Bagwell in the previous season as well as for some period before that.

32. The evidence establishes that in 1982, the complainant registered on the out-of-work list, even though he was not yet out of work. That February, he performed some hours of work, for wages, after he had registered himself as unemployed. He was not unemployed. He was still working - albeit the season was "winding down". Yet by registering early while continuing to work, he might have gained some advantage on the out-of-work list since his name would appear above those of other employees who were laid off later.

33. Last thought that the complainant was "playing games". He was "not playing by

the hiring hall rules''. He was cheating. Thus, when Bagwell requested ten employees by name – in itself a practice which Last had tried to discourage – Last was not prepared to accede to that request in the complainant's case. Last testified that there were other employees who had worked for Bagwell just as long as the complainant, had been laid off at the same time, and had "played by the rules''. They were sent in response to Bagwell's request for workers.

34. The complainant contends that this Board should go behind the earlier settlement and determine the propriety of the 1982 referral because the failure to refer him to Bagwell in 1982 may have had consequences in the following year. The complainant asserts that, but for the allegedly improper 1982 referral, he would have been part of the 1982 crew so that *in 1983* he would have been in a better position to claim a job with Bagwell than those who were sent. We do not agree. The 1982 referral was the subject of a section 89 complaint which was resolved by a written settlement. That settlement fully and finally resolved the matters then in dispute between the parties and without any admission of liability on the respondent's part. Having settled his case in 1982, we do not think it is open to the complainant to revive those allegations now in order to argue that, after all, and despite the settlement, the 1982 referral was illegal. We therefore decline to make any finding on the 1982 referral one way or the other. The complainant's case must stand or fall on whether he can show that in 1983, he was dealt with in a manner that was arbitrary, discriminatory or in bad faith, and we do not think the evidence supports a finding of bad faith or discrimination.

35. On a more general level, the complainant argues that the hiring hall system itself is totally arbitrary, since it is based entirely upon the exercise of Last's subjective and largely unfettered discretion. It is Last alone who determines what weight is to be given to particular criteria and, the complainant asserts, an individual may never know why he has been passed over. He may not even know the variety of factors which Last could take into consideration. Counsel notes the degree to which Last relies upon his memory and points out that, in cross-examination, his memory was often fallible; moreover, counsel notes Last's admission that in the particular referral at issue, instead of sending five members of the 1982 crew and three individuals high on the list with particular needs, he might have sent some other combination if, in his (Last's) opinion, there were others with an equitable claim to these work opportunities. In the complainant's submission, such subjective judgments are totally arbitrary and no more than an expression of Last's whims at a particular time.

36. The union responds that the exercise of discretion is inevitable. A "strict list" or "first in, first out" system is not workable, nor do any of the members want it. That is why the question of the business agent's discretion was recognized and formalized in the Local union's bylaws which were ratified by a solid majority at a meeting specially called for that purpose. In the union's submission, the question is not the existence of the business agent's discretion, but how it is exercised in particular cases. The union argues that, on the evidence, the failure to refer the complainant to Bagwell in 1983 was not motivated by discrimination or bad faith, and was not based on arbitrary considerations.

37. Similar issues and arguments were canvassed before the Board in *Richard Boon et al. and Labourers' International Union of North America, Local 247*, Board File No. 2393-81-U, decision released September 21, 1982, unreported, and in view of the periodic recurrence of problems such as this, the views of the Board in that case are worthy of brief mention. In *Boon*, the union hiring hall was in fact run on a strict first in, first out basis,

and the gist of the complaint was that the union's officers had introduced a discretionary element into the system by taking into account the expiry of members' UIC benefits. That exercise of discretion was the subject of complaint, however, at page 7 the Board commented:

13. It is clear that the operation of any hiring hall is a complicated matter and undoubtedly must involve various levels of discretion. Presumably a hiring hall is operated correctly if that discretion is exercised in a manner which is demonstrably for the benefit of the members of the union as a whole or even simply the unemployed members of the union. As a consequence, unions frequently make specific rules concerning the operation of the hiring hall and, indeed, the respondent local trade union has in fact formally set out the informal rules which had governed the operation of its hiring hall. Although these rules have been set out in the by-law, it is clear that they nevertheless involve the use of discretion. That discretion, however, cannot be exercised in a manner contrary to section 69 of the Act. However, the mere exercise of discretion does not in of itself constitute a violation of section 69. What gives rise to a complaint under section 69 is the manner in which the discretion is exercised. In point of fact the complainants themselves in this case were all the beneficiaries of the type of discretion which is inherent in the operation of a hiring hall, but because it was for the benefit of certain members as a whole does not constitute a violation of section 69.

14. The type of discretion referred to relates to the matter of U.I.C. benefits. It is clear that the local from 1979 through 1980 suffered a high level of unemployment. That unemployment was for such a long duration that members started to run out of U.I.C. benefits. Thus, notwithstanding a "first-in-first-out" rule concerning assignments to employment from the hiring hall, the local adopted a policy with respect to the hiring hall, that if a member demonstrated to the local that he had run out of U.I.C. benefits he would be placed in employment as soon as possible in an effort to rebuild benefits from the U.I.C. This is, of course, a discretionary change from the "first-in-first-out" general rule of operation. However, it can be seen that it was adopted as a policy for everyone and that it was exercised in an attempt to benefit the members both individually and as a whole. Indeed, this practice has also helped the complainants. It would be impossible to say that such a discretionary change in the hard and fast rule for operating a hiring hall is in of itself a violation of section 69, notwithstanding the fact that certain members who might have been out of work longer were not referred to jobs because they still had U.I.C. benefits.

In our view, these observations are equally apposite in the instant case, even though here the union's case is stronger because the hiring hall is not operated on a "first in, first out" basis and the bylaws now formally authorize the exercise of the business agent's discretion.

38. Neither the fact of discretion nor its exercise are, per se, illegal. Discretion is inevitable in the circumstances. The business manager must balance a number of factors in determining which of the available out-of-work members should be sent to a particular job at

a particular time. In so doing, he may well make an honest mistake. But the question is not whether the business manager (and, vicariously through him the union) may have erred in some way or made a decision of which this Board, with hindsight disapproves. Business agents, being human, will make mistakes or errors in judgment and may even appear to be inconsistent from time to time as they respond to the circumstances of the moment, and perhaps, subjective pleas for special consideration. The question is whether that discretion has been abused – for example, to benefit family or friends, or to punish political enemies (see *Joe Portiss, supra*). Obviously nepotism and patronage have no place in the hiring hall system, nor should the Board condone reliance upon obviously extraneous factors. But where a union official honestly turns his mind to the circumstances at hand, and without malice or any improper intent makes a sincere effort to assess the situation and balance competing claims before dispatching employees, we do not think we should readily infer that the decision was “arbitrary” and illegal. The term “arbitrary” in section 69 was intended to connote a decision-making process that is reckless, cursory, consistent with a non-caring attitude or influenced by totally extraneous and irrelevant considerations. The facts of this case do not fall within those parameters at all.

39. In the circumstances of the instant case, we are satisfied that Last did not act improperly. The factors which he considered when making the impugned referral are reasonable ones and we find that he was acting in good faith. There is no basis for the complainant’s assertion that he was singled out for invidious discrimination or dealt with unfairly. There has been no breach of section 69 of the Act.

40. This is not to say that we are entirely happy about the way in which the hiring hall is operated. The union’s record-keeping procedures leave something to be desired and the heavy reliance on Mr. Last’s memory creates a real potential for error. There may be up to 100 unemployed members on the list at any one time, and it will obviously be difficult for Last to remember the qualifications, preferences and circumstances of each one of them. An honest error may not be illegal but the union should still make every effort to reduce the potential for error and the possibility that members may *think* they have been dealt with unfairly. Unless the union’s hiring hall rules and the factors which Last takes into account are reduced to writing and regularly explained to the membership so that there can be no excuse for misunderstanding, suspicions are bound to arise fueling dissention in the Local and potentially costly and unnecessary litigation. Equally important, if members are not fully aware of the criteria which might support their claim for a job referral, they may fail to communicate their situation to Last and, in consequence, remain out of work longer than might otherwise be the case. However, it is one thing to suggest that the system could be improved or that more effort should be made to educate the membership. It is quite another to suggest that the existing system, endorsed by the membership, is illegal, or that Last himself has acted improperly and in contravention of section 69 of the *Labour Relations Act*. We do not think that the evidence supports either proposition.

41. For the foregoing reasons, this complaint is dismissed.

1346-83-R Susan Flewelling, on her behalf and on behalf of a group of employees, Applicant, v. United Steelworkers of America, Respondent, v. **Crock & Block Restaurant**, Intervener

Practice and Procedure – Representation Vote – Termination – Union propaganda attacking personal integrity of person sponsoring termination application – Not reason to interfere with results of vote – Extent of Board intervention on basis of inaccurate or misleading propaganda preceding vote

BEFORE: Owen V. Gray, Vice-Chairman and Board Members F. W. Murray and L. C. Collins.

APPEARANCES: *David J. Sherman, Lee Rhodenizes, Eric Costello and Lori Flegg for the applicant; Keith Oleksiuk and Bill Fuller for the respondent; Michael L. Powell for the intervener.*

DECISION OF THE BOARD; January 4, 1984

1. On September 15, 1983 the applicant filed an application under section 57 of the *Labour Relations Act* for a declaration that the respondent no longer represents the employees of the intervener for which it is the bargaining agent. By letter dated September 29, 1983, the respondent union advised the Board that it consented to the taking of a representation vote. Accordingly, by a decision dated October 4, 1983, the Board directed that a representation vote be taken.

2. The vote was conducted November 12, 1983. Of the 41 employees on the employer's list filed in this application, 37 cast ballots. One person whose name did not appear on the list also cast a ballot, which was segregated. The unsegregated ballots were counted. Twenty were marked in favour of the respondent trade union; only 17 ballots were marked against the respondent.

3. By a letter dated November 18, 1983, counsel for the applicant requested a hearing into allegations of improper conduct of trade union representatives. The letter alleged the circulation by the trade union of a leaflet which the applicant alleged could be and would have been interpreted as indicating that the applicant had been supported by the employer in this application. The applicant further alleged that certain statements of fact in this pamphlet misrepresented the past labour relations history of the intervener employer. The letter says this:

It is the position of the Applicant that the total effect of this leaflet was to falsely characterize the representation vote as a union vs. management scenario in which management was held to be a threat to the employees. As a consequence the employees of the company were placed in fear of their jobs and livelihood and were, therefore, prevented from freely expressing their true wishes by means of a representation vote.

4. At the outset of the hearing in this matter, it became apparent that the applicant relied not only on the leaflet and its contents but also on other behaviour by employees of

the intervener whose interests lie with the union. Particulars of this behaviour were first provided at the hearing in response to questions from the Board. Those allegations are summarized in the ruling the Board made orally at the hearing, the text of which is reproduced later in this decision.

5. The respondent's representative raised as a preliminary matter the argument that the applicant's allegations disclosed no prima facie case for relief and, alternately, that the Board should decline to entertain evidence in support of allegations insufficiently particularized, having regard Rule 72 of the Board's Rules of Procedure. The Board indicated it would hear the parties on the question whether the applicant's allegations disclosed a prima facie case. In that respect, the respondent referred the Board to paragraph 16 of the decision in *Indusmin Limited*, [1982] OLRB Rep. Nov. 1641 and at paragraph 34 of the decision in *Vogue Brassiere Incorporated*, [1983] OLRB Rep. Oct. 1737, as setting out the correct tests in cases of this kind. In particular, it was argued that the Board will not respond to pre-vote propaganda by ordering a new vote unless the propaganda is such as to interfere critically with the ability of voters to respond to and assess such propaganda. The mere fact that propaganda is false or misleading will not alone result in the Board ordering a new vote.

6. The intervener employer was represented by counsel at the hearing. Counsel advised the Board that the intervener took no position one way or the other with respect to this dispute between the applicant and the respondent trade union.

7. During the course of his argument, counsel for the applicant indicated he would not be calling any evidence with respect to matters arising prior to the date of the order directing the vote. The intervener proposed to call no evidence. It was apparent, therefore, that even if the Board heard evidence, no attack on the union's propaganda could be made on the basis of the truth or falsity of the union's description in its leaflet of employment relations as they existed with this employer prior to the union's arrival on the scene. Although it was part of the applicant's complaint that union propaganda suggested to employees, and particularly older employees, that their jobs were in jeopardy if the union were removed, counsel for the applicant conceded he had no evidence to show, for example, that the jobs of senior employees were not in jeopardy. He took the position that where the trade union makes an allegation in a campaign the onus is on the trade union to prove its truth if challenged.

8. After hearing and considering the representations of the parties, the Board delivered the following oral ruling at the hearing in this matter:

The applicant asks that we set aside the result of the representation vote herein held November 12, 1983, on the ground that the written and oral pre-vote propaganda on behalf of the respondent union was misleading. The particulars of the impugned propaganda are set out in a letter to the Board from counsel to the applicant dated November 18, 1983. At the hearing this morning, counsel for the applicant enlarged the applicant's attack on union propaganda, alleging that employee members of the respondent's bargaining committee had:

- (1) told employees that the applicant had been acting on behalf of management in this matter, and that she was collecting from management a cheque to cover her legal fees;

- (2) told older waitresses that they would be fired by management if the Union was decertified; and,
- (3) told employees generally that everyone's job could be in jeopardy if the Union goes, as they could then be fired for the slightest excuse.

Further, the applicant alleged that a rank and file employee told employees that they would all be fired if the union was decertified, and then touted the union's pamphlet of November 8th as confirming his suspicion.

The respondent trade union argued that before hearing evidence in support of these allegations we should hear his argument the Board should not grant relief even if all such allegations were true. We have entertained that argument.

The submissions of counsel were made by them and considered by this Board on the assumption that the facts alleged by the applicant are entirely true and, we might add, that any allegation of collusion between the applicant and her employer is totally false.

Indusmin Limited, [1982] OLRB Rep. Nov. 1641 sets out the Board's jurisprudence on representation vote propaganda and the degree to which the Board will respond to inaccurate or misleading propaganda by ordering a second vote. Reference may also be made to the yet unreported decision of the Board dated October 26, 1983 in *Vogue Brassiere Limited*, Board File #0646-83-R.

As those decisions indicate, the Board does not normally interfere with a vote preceded by propaganda which is speculative, exaggerated, misleading or even false. The Board recognizes that in representation votes as in other electoral processes voters must be presumed capable of assessing critically the conflicting arguments often presented by the interests which compete for their votes.

In our unanimous view, the statements here attributed to the union's representatives are not of such a nature that the critical faculties of employee voters would have been overpowered.

We conclude, therefore, that we would not order a new vote even if the applicant proved all she has alleged.

We do wish to comment specifically on the allegations made against the integrity of the applicant. These have been described by her counsel as defamatory both of the applicant and her employer. We have no jurisdiction to award compensation for or punish publishers of defamatory statements. That jurisdiction lies elsewhere. Our concern is with a vote in which employees were asked to say whether they wished to continue

to be represented by the respondent. It was not a vote of confidence or non-confidence in the applicant. While we cannot say that these allegations could not have influenced employee voters in some way, the influence is of the same sort as that created by allegations that dues dollars go to support fat cat American trade union leaders, or like attacks on employer malevolence. However unpleasant or even actionable elsewhere, the Board will not be quick to control the use of such propaganda, because the justification for so doing is unclear and the potential restraints undue. In the result, then, the vote of November 12, 1983 will stand.

9. The Board hereby confirms its ruling. Accordingly, this application for a declaration terminating the bargaining rights of the respondent is hereby dismissed.

1880-83-R Crothall Employees Ongwanada Hospital Penrose Div. 752 King St. W. Kingston Ont., Applicant, v. Canadian Union of Public Employees, Respondent, v. Crothall Services Limited, Intervener, v. Employee, Objector

Petition – Termination – Petition initiated and circulated with no employer involvement – Copy containing signatures subsequently given to manager – Petitioners seeking assistance to attend Board hearing in Toronto given two days off – All expenses of petitioners picked up by manager – Employer conduct amounting to interference – Making free vote impossible – Application dismissed

BEFORE: G. Gail Brent, Vice-Chairman, and Board Members J. A. Ronson and W. F. Rutherford.

APPEARANCES: David Soper and Ed Barker for the applicant; Helen O'Regan and R. Millage for the respondent; James G. Knight and James G. Cooper for the intervener; no one for the objector.

DECISION OF VICE-CHAIRMAN, G. GAIL BRENT AND BOARD MEMBER W. F. RUTHERFORD; January 13, 1984

1. The applicant has applied to the Board under section 57 of the *Labour Relations Act* for a declaration that the respondent no longer represents the employees in the bargaining unit for which it is the bargaining agent.

2. There are two bargaining units represented by the respondent, a full-time unit and a part-time unit. There are two certificates which were issued on different days. It was agreed by the parties that there had been no collective agreement entered into in respect of either unit since certification; however, only the application in respect of the full-time unit is timely because of the different dates on the certificates. Accordingly, the application in respect of the part-time unit was withdrawn.

3. The evidence before us indicates that a sufficient number of employees in the full-time bargaining unit have indicated that they no longer wish to be represented by the respondent to allow the Board to order a vote. The sole question is whether there has been interference or assistance by the employer such that the vote should not be ordered.

4. The facts in this case are very unusual; however, they are relatively straightforward and can be summarized without difficulty. There are eight employees in this bargaining unit; they are employed by the respondent to clean a hospital. There is no doubt from the evidence that the employees themselves generated the idea that they should terminate the respondent's bargaining rights, largely because they had heard nothing about any progress toward achieving a collective agreement. Mr. Soper, the steward, had his daughter type the petition at home, and he and Mr. Barker, another cleaner, circulated it among the employees. There is no evidence that the employer was aware of this or in any way assisted in the preparation and circulation of the document.

5. After the signatures had been obtained by Messrs. Soper and Barker, Mr. Soper took the document and had copies made of it. He had sufficient copies made for every employee and distributed them at lunch when the members of the bargaining unit were sitting together at their usual table. At that time Mr. Cooper, the employer's manager on the premises, was seen going into another part of the cafeteria, and it was suggested that they let him know what they were doing. As a body, the bargaining unit employees went over to Mr. Cooper and presented him with a copy of the petition showing the signatures of all who signed it. Apparently Mr. Cooper was somewhat taken aback by this gesture but he took the copy he was offered.

6. Mr. Soper filed the application for termination with the Board along with the statement signed by the employees. He had been in touch with the Board by telephone a couple of times to ask for forms, etc. He had not asked or been informed about the possibility of the hearing being held in Kingston.

7. When the date for hearing was set, it was scheduled for Toronto according to the Board's usual practice. Both Mr. Soper and Mr. Barker concluded that they could not afford to make the trip from Kingston in order to state their case. They approached the respondent and informed it about their financial problems, indicated that they might not be able to appear without assistance, and asked for financial support. Not surprisingly, the respondent refused to give them any support or assistance. The respondent did not inform them that they could request that the hearing be held in Kingston. The two men then approached Mr. Cooper and asked him for financial assistance to come to Toronto for the case. Mr. Cooper gave them two days off, paid for their train fare to and from Toronto, paid for their hotel stay in Toronto the night before the hearing, and bought one of them dinner the night before the hearing. In addition, the three of them travelled to Toronto together, stayed at the same hotel, and had dinner together. According to the evidence before us, Mr. Cooper told the two men that he would pay and ask the employer to pick up the costs; however, if the employer refused, then they would make arrangements about reimbursement.

8. The nub of the problem is that we are faced with a statement of employees' desire initiated, circulated and signed without employer support, assistance, or participation of any kind, followed by the active participation and assistance of the employer in ensuring that the matter could be heard by this Board in Toronto. By the time the assistance was offered, the

employer was also in as good a position as anyone to know that the two men had collected enough signatures to justify a vote of the employees.

9. Needless to say, there are no cases which have faced such a situation. The parties cited none to us and we were able to find none on our own. The respondent has asked us not to order a vote because of the extraordinary assistance given by the employer in this case.

10. In the course of our research, we did find some cases which may be of some general assistance. In *Selinger Wood Ltd.*, [1979] OLRB Rep. May 434, the Board heard evidence that the employee who wanted to get rid of the union was referred to a lawyer by a member of management and, after asking who would pay the legal fees, was told that the company would take care of the fees. That was all the evidence before the Board when it concluded, at page 435, paragraph 6:

In view of the involvement of management described by Mr. Schoemaker [the employee], the Board is unable to find that the document presented in support of the application was voluntarily signed by the employees whose names appear thereon. In the circumstances, the Board has no alternative but to dismiss the application.

While that conduct occurred prior to the circulation of the petition, it does indicate the concern which the Board has shown in the face of financial assistance being rendered by an employer.

11. The Board's concern about employer involvement in termination applications was expressed cogently and at some length in *Empco-Fab Ltd.*, [1982] OLRB Rep. Aug. 1162. That case is different from this on its facts. It dealt with the question of perceived management involvement because of an agreement by management to pay legal fees of a petitioner in an earlier pre-certification petition. In dealing with the role of management generally, the Board said at pages 1164 to 1166 (paragraphs 10 to 16):

10. It is central to the *Labour Relations Act* that an employer is not to interfere with the administration of a trade union or in the matter of representation of his employees by a union. Section 64 of the Act provides:

64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

11. The right of an employee to freely chose or not to be represented by a trade union is protected under the Act. It is specifically protected from interference by the employer, whether by coercion or bribery. Section 66(c) of the Act provides:

66. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, *or by any other means* to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

(emphasis added)

The Act contemplates that apart from the reasonable exercise of his freedom to lawfully express his views an employer should be uninvolved in any exercise of rights by employees under the Act. That is so whether his interference takes the form of threats or intimidation aimed at union supporters or favours or financial support given either to union supporters or to union opponents among his employees.

12. The most common form of employer financial support proscribed by the Act relates to the employer dominated union. The Act contemplates that as a precondition to certification, the union and employer must be in a clearly arm's length relationship. (*Dr. George A. Morgan Dental Centre* [1977] OLRB Rep. Jan. 1). Section 13 of the Act bars the certification of the "sweetheart" union in the following terms:

13. The Board shall not certify a trade union if any employer or any employers' organization has participated in its formation or administration or has contributed financial or other support to it or if it discriminates against any person because of his race, creed, colour, nationality, ancestry, age, sex or place of origin.

13. The Act goes further to provide that an agreement between an employer dominated organization and the employer is not a collective agreement for the purposes of the Act. Section 48(a) provides:

48. An agreement between an employer or an employers' organization and a trade union shall be deemed not to be a collective agreement for the purposes of this Act,

- (a) if an employer or an employers' organization participated in the formation or administration of the trade union or if an employer or an employers' organization contributed financial or other support to the trade union;

14. The Board has in the past not only found that a sweetheart agreement is not a collective agreement for the purposes of the Act, but has concluded that a trade union purporting to be party to such an agreement has relinquished its status as a trade union under the Act. (See, *Norfish*

Ltd., [1965] OLRB Rep. Sept. 414 at 416). An employer dominated body is not a union within the meaning of the Act.

15. It is no less improper for an employer to support employees opposed to a union than it is for an employer to support a union itself. The cases are legion in which the Board has found that granting favours to employees who oppose a union and the encouragement of such employees, is contrary to the Act. That is so whether the employer assistance is in the form of a promise to pay the legal fees of employees opposing a union (e.g. *Selinger Wood Ltd.*, [1979] OLRB Rep. May 434) or providing employees time and facilities to organize and conduct anti-union meetings (e.g. *Skyline Hotels Ltd.*, [1979] OLRB Rep. Dec, 1811 at 1820-21). The Board has also found that repeated company sponsored meetings aimed at exhorting anti-union employees to organize are employer interference with employees' rights contrary to the Act, (*K. Mart Canada Ltd.*, [1981] OLRB Rep. Jan. 60 at 72, 80-81).

16. An employer can align himself neither with the employees who favour a union nor with those who are opposed. Doing so distorts the balance of choice and frustrates the free exercise of employees' rights under the Act. Support to either camp, whether open or covert, amounts to interference contrary to the Act. While it may be impossible in the real world to expect employees to make their choice for or against a union in "laboratory conditions" unaffected by any outside influences, the Act strives insofar as possible to insulate the process by which employees select or reject union representation. Apart from the right to express his views, a right whose exercise requires some care, the Act imposes a simple rule for the employer: "Do not interfere". That rule, it should be stressed, is generally accepted and observed by the vast majority of employers who appear before the Board in applications relating to the representation of their employees by a union.

12. The Board also said, in paragraph 18 of the same decision:

18. Is unlawful interference with the selection or administration of a trade union or with the rights of employees made out in this case? In the instant case an employee succeeded in defeating an application for certification. It would surely be unlawful for his employer to have rewarded him for his efforts, *ex post facto*, by giving him a promotion or granting him a raise purely for defeating the union, just as it would be unlawful to penalize an employee who worked for the union's cause. Either act would be in violation of section 66 of the Act, no matter when it occurred. The "hands off" rule knows no time limitation: it binds the employer before, during and after an application for certification.

13. The case at hand bears some similarity to an *ex post facto* reward. The employees who circulated the petition so successfully got two days off work and received an all expense paid trip to Toronto to press their case for the termination of the respondent's bargaining rights. Even without construing this as an *ex post facto* reward, the employees would never have been

able to come to Toronto to make their case had it not been for the active assistance of management. This assistance was given after management had before it the information necessary to conclude that the employees would likely succeed in its attempt to have the union's bargaining rights terminated.

14. Under the circumstances, we cannot ignore the assistance given by the employer and we must conclude that it is interference which is contrary to the Act. Its assistance has aligned it squarely with the employees who favour the termination of the trade union's bargaining rights. Such overt actions in the face of the employer's knowledge of the names on the petition, could influence the outcome of any vote which the Board ordered.

15. Put bluntly, and echoing the review of the law done in *Empco-Fab Ltd.*, (supra), the employer has become an actor in a drama in which his proper role is one of interested spectator. To allow this to happen, even when everyone's motives are innocent, is to upset the balance prescribed by the Act and to risk a distortion of any picture which attempted to describe the true wishes of the employees. Such employer action could discourage employees from changing their minds either before or after the Board hearing. To allow this action by the employer to pass unnoticed is to invite others, who may be less scrupulous, to ensure that termination applications are proceeded with by postponing their assistance and co-operation until after the documents are filed with the Board and then, by their actions, inform the employees that it will look with favour on any attempt to get rid of the union.

16. Having regard to the general prohibition against employer participation or interference in the selection of a trade union in section 64 of the Act, we consider that to allow a vote pursuant to section 57 of the Act would be tantamount to condoning a violation of section 64. In view of this interference, along with the employer's knowledge when it gave the assistance, we cannot be certain that the evidence before us can be relied on as a voluntary signification of the employees' wishes. Accordingly, the application is dismissed.

17. The decision of Board Member J. A. Ronson will follow.

1238-83-R International Association of Bridge, Structural and Ornamental Ironworkers, Local Union No. 834, Applicant, v. **Frankel Steel Limited**, Respondent, v. United Steelworkers of America, Intervener

Membership Evidence – Practice and Procedure – Whether Form 9 declarant made requisite inquiry – Distinction between failure to collect dollar by union official and rank and file collector – Whether single non-pay resulting in rejection of all cards collected by individual – Board taking into account whether rejection of all cards resulting in vote or of outright dismissal

BEFORE: Richard M. Brown, Vice-Chairman, and Board Members J. A. Ronson and W. F. Rutherford.

APPEARANCES: *A. M. Minsky and M. Zigler for the applicant; no one appearing for the respondent; Brian Shell and Doug Hart for the intervener.*

DECISION OF THE BOARD; January 11, 1984

1. By decision dated September 19, 1983, the Board directed that a pre-hearing representation vote be taken. The election was conducted on September 22nd, but the ballot box was sealed, because the intervener contended that the membership evidence, upon which the applicant relied in obtaining the vote, was flawed. In particular, the intervener alleged that not all of the employees who the applicant claimed as its members had paid one dollar.

2. To qualify for a pre-hearing vote, under section 9 of the *Labour Relations Act*, an applicant must demonstrate that not less than thirty-five per cent of the employees in the voting constituency were members at the time the application was made. The only issue is whether or not the applicant has met the threshold of thirty-five per cent membership. According to section 1(1)(l) of the Act, a person who applies for membership in a union and pays one dollar thereby becomes a member.

To ensure that the necessary payment has been made, section 6 of the Rules of Procedure requires an applicant to file a declaration concerning membership documents in Form 9. A Form 9 declarant must attest that:

(Where the documentary evidence consists in part of receipts or other acknowledgements of the payment on account of dues or initiation fees.) On the basis of my personal knowledge and inquiries that I have made, I state that the persons whose names appear on the receipts or other acknowledgments of the payment on account of dues or initiation fees are the persons who actually collected the money's paid on account of dues or initiation fees and that each member, on whose behalf a receipt or an acknowledgment of payment is submitted has personally paid in money the amount shown thereon on his own behalf to the person whose name appears on his receipt or acknowledgment of payment as collector. EXCEPT IN THE FOLLOWING INSTANCES:

The intervener contends that two employees, claimed by the applicant as members – Steven Hall and Max Colbourne – did not pay one dollar and that the Form 9 declarant failed to make the requisite inquiries.

3. According to Max Colbourne, he was given a union card by an employee collector, Gardener Beckles, on August 2, 1983. Colbourne signed the card at his locker and returned it to Beckles on the same day. Beckles asked for a dollar when he handed out the card and Colbourne replied that he did not have one. Beckles did not ask again when the card was handed back, saying that he would “catch” Colbourne later. At the hearing, Colbourne produced a blank receipt which he said he detached from the card before returning it to Beckles. The card is made up of three parts – an application for membership, a declaration by the employee attesting to the amount paid, and an acknowledgment by the collector of receipt of the money paid. Max Colbourne signed the first two parts of this card, and Beckles the third. Colbourne initially identified the first two signatures as his own. After his attention was drawn to a “swirl” that appears in one signature and not the other, he disclaimed the one containing the “swirl”. He changed his mind again when a signature written by him shortly before the hearing, bearing the “swirl”, was produced. All three portions of the card are dated June 2nd. During examination-in-chief, Colbourne said he thought the card was not dated when he saw it, but in cross-examination he said that he filled in the top date, which does appear to be in his handwriting. He said that the spaces on the card for indicating the amount of money paid and received were blank when he signed the card. Colbourne testified that he did not pay a dollar and that no one paid on his behalf. However, he conceded that, shortly before the hearing, he told a representative of the applicant that he did not know whether or not a friend paid a dollar for him. Colbourne also testified that, a few days after he returned his card to Beckles, he was given three or four additional cards by Beckles. Colbourne collected a dollar from another employee, who signed a card dated August 9th; Colbourne then gave the card and the dollar to Beckles. This card was not submitted with the application for certification, because the employee’s signature was illegible and Colbourne was not able to identify the person who signed it.

4. According to Beckles, he gave Colbourne five cards several days before August 2nd. On that date, Colbourne handed back two dollars and two cards – one signed by Colbourne and the other bearing the illegible signature – accompanied by two dollars. Beckles saw Colbourne sign his card at this time, and later filled in the amount of one dollar on the card. Beckles also testified that he signed the receipt retained by Colbourne.

5. How are we to choose between the two conflicting stories put before us? The reliability of Colbourne’s testimony is weakened to some extent by the internal inconsistencies in his evidence concerning who signed and dated his card, and by his inability to identify the person from whom he obtained a card. On the other hand, two pieces of documentary evidence support the account offered by Colbourne and contradict Beckles’ testimony. The card signed by the unknown employee is dated August 9th. This date is consistent with Colbourne’s evidence that Beckles gave him the card in question after he returned his own card, dated August 2nd, to Beckles. The August 9th date appearing on the unknown employee’s card directly contradicts Beckles’ evidence that both cards were returned to him, together with two dollars, on August 2nd, immediately after Colbourne signed his card. In addition, the blank receipt produced by Colbourne supports his evidence that he detached the blank receipt from his card and contradicts Beckles’ contention that he signed the receipt. Considering all of these

factors, we prefer Colbourne's evidence to that given by Beckles, and we find, on the balance of probabilities, that Max Colbourne did not pay one dollar.

6. Steven Hall testified that he was first approached by Claude Morris, another employee collector, on August 11th. Morris asked Hall to sign a card and pay a dollar, but Hall did not comply, as he did not have a dollar. On Friday August 12th, at approximately 2:00 a.m., Morris met Hall in the front shop washroom. Hall signed a card in two places, applying for membership and acknowledging payment of one dollar, and Morris affixed his signature to acknowledge receipt of one dollar. According to Hall, he paid no money, because he still did not have a dollar, but he undertook to pay later. He knew that he was applying to join Local 834. Hall testified that Morris asked for payment on three or four occasions during the following week. The last time, near the stock room in the south shop, Hall paid seventy-five cents which was all the money he had. He had been carrying seventy-five cents in the pocket of his work clothes ever since he was called back from a eleven month layoff on August 2nd. He received his first pay cheque on August 10th, but did not put any more cash in his pocket; his practice is not to carry paper money at work.

7. According to Morris, he received one dollar from Hall in two installments – seventy-five cents on August 12th and the balance on August 15th. Morris testified that Hall paid seventy-five cents on Friday, August 12th, when the card was signed in the washroom at 2:00 a.m. According to Morris, the card was filled out before Hall announced that he did not have a dollar. Morris said the card could not be submitted until the dollar was paid. Morris testified that Hall was the only person who signed a card and did not pay a dollar at the same time. At some point after Hall signed the card, he said he had thought that he was joining Local 721 rather than the applicant, Local 834. On Monday, August 15th, Morris approached Hall who said he had no change; Morris replied he would return after their coffee break. When they met later that day, Hall paid twenty-five cents – in the form of two dimes and a nickel.

8. According to Morris, sometime on or before August 11th, Roy Sim, a district representative with the applicant's parent union, told him he would be at the Herigate Inn on August 12th and August 15th. Morris did not go to the Herigate on August 12th, because Hall had not yet paid in full. Morris testified that he met Sim after work on August 15th and gave him Hall's card, accompanied by a one dollar bill, along with three other cards and three dollars. Our review of the membership evidence disclosed that Claude Morris first solicited membership on August 11th, when six employees were enlisted. Morris recruited six more employees on August 12th, not counting Hall, and no others until August 23rd. This information lends some support to Morris' claim that he met Sim not long after Hall signed a card. On the other hand, this data suggests that if Morris did meet Sim on August 15th, but not August 12th, twelve cards would have been submitted. In addition to the July 15th meeting at the Herigate Inn, Morris met Sim there on other occasions, but Morris could not recall the dates. He could remember neither the deadline for handing in membership evidence, nor the first and last day upon which he solicited membership. However, he did recall when he had volunteered to be a collector, to whom this offer was made and when and where he first had met with a representative of the applicant. According to Morris, a week before the hearing, Hall said that he was "pretty sure" he didn't pay the other twenty-five cents, and that Morris almost had him convinced he paid this amount. These two statements were made on two successive days.

9. The documentary evidence is of no assistance in determining whether or not Steven

Hall paid a dollar. Although both he and Morris signed Hall's card to indicate a dollar was paid on August 12th, they are agreed that a dollar was not paid at this time. Counsel for the intervener urged us to reject Morris' evidence on the theory that his recall of receiving two dimes and a nickel, rather than a quarter, was so specific as not to be credible, given the two months that elapsed between this event and when he testified. But Hall's recollection of carrying precisely seventy-five cents in his pocket for a period of two weeks was no less detailed. In these circumstances, we are not prepared to reject one witness's testimony because it was excessively specific. But we are concerned by the contrast between Morris' sharp recall of the events surrounding the dollar in question and his less vivid recollection of other contemporaneous occurrences. However, in our view, Hall's recent statements, expressing doubt as to whether or not he eventually paid an additional twenty-five cents, tip the scales in favour of Morris, who was certain that he did not give Hall's card to Sim until a full dollar had been collected.

10. Roy Sim is the Form 9 declarant in this proceeding. Sim and Sam Perry, a representative of the applicant, are named as collectors on several cards, but the vast majority of employees who signed cards were enlisted by five employee collectors, including Beckles and Morris. Sim testified that all collectors were instructed that they must obtain a dollar from each employee who signed a card. Beckles confirmed that he received this instruction from Sim; Morris testified that he was told by Perry. According to Sim, each time he was given cards by a collector, he inquired if the collector had obtained a dollar from every applicant for membership. When a card was passed to Sim by a person other than the collector, Sim inquired whether or not that person had asked the collector if the employee in question had paid a dollar. These inquiries disclosed no irregularities. Sim received cards from Morris three or four times and from another collector on possibly as many as twelve to fifteen occasions. At the hearing, held some months later, Sim could not recall any particular conversation with a collector, but he was sure that he had followed his normal practice, as described above. Once again, Beckles and Morris confirmed Sim's testimony. Beckles testified that Sim always asked if a dollar had been collected from each person and that, when Beckles submitted the unknown employer's card, which showed Colbourne as collector, Sim inquired if Colbourne got a dollar from the individual in question. According to Morris, every time he passed in cards, Sim asked if he had obtained a dollar from each person who signed a card. On the night that Morris turned in Hall's card among others, he told Sim that all of the employees who signed these cards had paid a dollar. Morris did not say that Hall paid in two installments, or that any payment was made on a date other than that shown on the card.

11. Counsel for the intervener urged us to discount all of the applicant's membership evidence, because those in charge of the organizing drive did not properly discharge their responsibilities. In this regard, we were referred to *RCA Victor Company*, 53 CLLC ¶17,067:

In dealing with the quality of the evidence submitted by a trade union in support of its claim to be certified, a number of situations may be distinguished and we propose to examine some of them without in any way suggesting that the examination is comprehensive and exhaustive. Some of the evidence submitted may be patently forged or fraudulent, i.e., cards or receipt may be submitted bearing signatures which are not those of persons who purport to sign them or receipts may be submitted in respect of persons who have paid no money. Where it is established that even a single card or receipt submitted by an applicant union is affected by

such vice, and the card or receipt is submitted with the knowledge of a responsible officer or official of the union, the Board may come to the conclusion that it cannot place reliance on any of the evidence of membership submitted by the union. An example of such a situation is to be found in the *Upper Canada Mines Case*, (1953) C.L.S. 76,385, CCH *Canadian Labour Law Reports* 13,095, where the Board made the following findings:

- (a) One membership card filed with the Board by the applicant has been forged.
- (b) Eight of the employees examined by the Board did not pay the union fee set out in the receipts filed.
- (c) The dates on several receipts are not correct.
- (d) None of the employees examined by the Board ever did receive from the applicant a receipt for money payments.
- (e) The receipts filed by the applicant were not, in most cases, signed by the individual who actually received money from the employees.

The Board in that case dismissed the application on the ground that there had been "a flagrant and deliberate attempt by the applicant to evoke an effective scheme of conspiracy to defraud the Board". A similar result may follow even in a case where it is impossible to establish that an officer or official of the union had knowledge of the impropriety, but where it is evident that he was so lax in regard to the way in which documentary evidence of payment was obtained that he may reasonably be taken to have shut his eyes to the facts.

In *Webster Air Equipment Company*, 58 CLLC ¶18,110, the Board said:

In dealing with this situation, the Board has made a distinction between two types of cases: (1) where the action impugned is that of a responsible officer or official of a union, and (ii) where the action is that of a supporter or canvasser on behalf of an applicant who occupies an inferior office or no office in the union. In so far as the first of these is concerned, the Board said in the *RCA Victor Company Case*, (1953) CCH *Canadian Labour Law Reporter*, Transfer Binder, ¶17,067, C.L.S. 76-412, that, even where only a single card is defective and it is submitted with the knowledge of such responsible officer or official, "the Board may come to the conclusion that it cannot place reliance on any of the evidence of membership submitted, by the union". Where the irregularity relates to evidence of membership procured by a person of lesser rank in the union organization, the Board has taken the position that the card in respect of which the irregularity is established is disallowed and the weight to be given to the remaining evidence of membership will depend

on the nature of the irregularity and the extent to which the objectionable practice was resorted to in the signing up of members.

The distinction drawn in these cases between responsible union officials and other individuals was later modified. In *Olympia & York Developments Limited*, [1977] OLRB Rep. Dec. 852, the Board distinguished between those who have charge of an organizing campaign and those who play a lesser role:

16. The Board has observed a distinction between the actions of union officials and those of rank and file employees in dealing with questions of conduct related to membership evidence. In the former situation, the Board has discounted all of the membership evidence where its requirements are not met, while in the latter, the Board has discounted, except in the circumstances set out below, only that portion of the membership evidence dealt with by the rank and file employee. Where, however, the fact is that even though the organizer is not a union official he is responsible for the entire organizational campaign, the Board has applied the same standards and made the same disposition as it would in the case of a union officer. (See *Byers Oil Burner Service*, [1969] OLRB Rep. Aug. 595; *Slough Estates Ltd.*, [1965] OLRB Rep. June 173; *Walter E. Selck of Canada Ltd.*, [1964] OLRB Rep. June 138.)

12. We conclude that Roy Sim made the requisite inquiries. The testimony of Sim, Morris and Beckles points to this conclusion, and there is no evidence to the contrary. We digress to note that the practice followed by Sim, of not recording the inquiries made, might in another case, where the evidence was less clear cut, lead the Board to doubt a bold assertion, made months after a lengthy organizing campaign, that the appropriate questions were asked on each of the numerous occasions that membership evidence was submitted to a Form 9 declarant. Considering the full inquiries made by Sim, his ignorance of Colbourne's failure to pay a dollar, and the instructions given by Sim and Perry to all employee collectors, we see no ground to impugn the conduct of Sim and Perry, the two people responsible for the conduct of the applicant's campaign. Moreover, no deficiencies in the cards collected by anyone other than Beckles has been established. Consequently, we find all the membership evidence, except that submitted by Beckles, to be reliable. This case is clearly distinguishable from others in which those in charge of an organizing campaign either have been so lax that numerous irregularities have gone undetected or have failed to disclose known irregularities. In these circumstances, the Board has rejected all of the membership evidence put before it. See *The Watson Manufacturing Company of Paris Limited*, [1967] OLRB Rep. Dec. 862; *Consumers Distributing Company*, [1974] OLRB Rep. June 350; *Olympia & York Developments Limited*, *supra*; and *Diplock Durable Floor Co.*, [1978] OLRB Rep. July 613.

13. Colbourne's card must be disregarded, because we have found that Beckles did not collect a dollar from Colbourne. If we were to reject twenty or more of the thirty cards on which Beckles appears as the collector, the applicant would fall below the thirty-five per cent threshold.

14. When a collector, who is not in charge of a campaign, is shown to have accepted

one card without proper payment, how has the Board treated the remaining membership evidence solicited by that person? In *Webster Air Equipment Company*, *supra*, the proper response was said to “depend upon the nature of the irregular conduct and the extent to which the objectionable practice was resorted to in the signing up of members”. The Board disregarded all of the cards solicited by a collector who told one applicant for membership not to worry about paying a dollar, in *Crock & Block Restaurant and Tavern*, [1980] OLRB Rep. Apr. 424. Deliberate flaunting of the legal criteria for union membership cannot be tolerated. But innocent errors have been treated differently. Where a collector was aware that the dollar submitted with a card had been loaned to the applicant for membership, but not that he did not intend to repay the loan, the Board has rejected only that one card: *N A Constructions* [1982] OLRB Rep. Jan. 77. See also *Federal Bolt & Nut Corporation*, [1966] OLRB Rep. May 108.

15. The distinction between innocent errors and deliberate misconduct is not always easily drawn. In *Trent Metals Limited*, [1976] OLRB Rep. Dec. 840, an employee who did not make any payment undertook, when signing a card, to pay a dollar the following day. The money was never paid and the collector either forgot or consciously overlooked this irregularity. As there was a possibility that other cards were similarly tainted, they too were rejected. But the only result of this ruling was to prevent the applicant from being certified on the basis of membership evidence. The resulting election resolved any uncertainty, arising out of the cards, as to the wishes of employees. In *Sterling Packers Ltd.*, [1972] OLRB Rep. June 705, a collector’s evidence that he had received a dollar was found to be as credible as the claim of an employee that he undertook to pay but never did, and the Board resolved the issue by holding that the applicant union had not discharged the burden of demonstrating the validity of its membership evidence. No finding was made as to whether the collector initially made an innocent error or consciously failed to follow proper procedures, nor as to whether the collector’s testimony was the product of honest confusion or deliberate subterfuge. If all of the cards submitted by this collector had been rejected, the application would have been dismissed. Instead of following this course, the Board disregarded only one card and ordered a vote. Here too an election would remove any doubts about the membership evidence.

16. Viewed together, these two cases pose a sharp contrast between two contexts in which a single card collected by an employee is proven to be tainted by an innocent mistake. In one setting, how the other cards collected by this person are treated determines whether a certificate will be issued without a vote or an election held. Faced with this issue, we would be inclined to order a vote, unless the nature of the irregularity was such that one could say with confidence that it was an isolated occurrence. The existence of one flawed card will often give rise to the possibility of other irregularities, and an election is the best way to resolve this doubt. Section 7(2) gives the Board ample authority to direct that a representation vote be taken – even when the applicant proves, on a balance of probabilities, that it has crossed the fifty-five per cent threshold. In the other context, the way the Board treats the remaining cards determines whether an election is held or the application dismissed. Even when the exact level of union membership is not absolutely certain, because one card is proven to be tainted, the Board may conclude, on the balance of probabilities – depending on the likelihood that the innocent error was repeated – the applicant has a sufficient number of members to be entitled to a vote, under either section 7(2) or 9(2). The resulting election will resolve any remaining uncertainty.

17. Turning to the facts of this case, we are not convinced that Beckles either deliberately disregarded the need to collect a dollar from Colbourne, or lied to the Board about this matter. In this regard, we rely upon Colbourne's testimony that, when the card was signed, he was asked for a dollar and, as he did not then have one, was told he would have to pay later. In the midst of collecting thirty cards, Beckles probably became confused as to whether or not Colbourne had paid. Beckles is not likely to have repeated this mistake twenty times. Given the setting, we find, on the balance of probabilities, that a sufficient number of the employees whose cards were submitted by Beckles were members of the applicant to entitle it to a pre-hearing vote.

18. We are satisfied that not less than thirty-five per cent of the employees of the respondent in the voting constituency were members of the applicant at the time the application was made. We direct that the ballots be counted. The matter is referred to the Registrar.

2166-83-R Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. **Hamilton Automobile Club**, Respondent, v. Group of Employees, Objectors

Bargaining Unit – Applicant seeking to carve out unit of full-time dispatchers from employer's unrepresented employees – Board finding dispatchers having greater community of interest with office and sales staff – Concern about fragmentation causing Board to find unit sought inappropriate

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members I. M. Stamp and C. A. Ballentine.

APPEARANCES: *Al LeFort for the applicant; C. E. Humphrey and J. Watson for the respondent; Michael Joseph Bernier, Terri Ann Reve, Wanda D. Oliver and Lorna Dunlop for the objectors.*

DECISION OF THE BOARD; January 16, 1984

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. The applicant is seeking to be certified to represent the respondent's employees in a bargaining unit which the applicant has described in the following terms:

All employees of the respondent at Hamilton, Ontario, save and except supervisors, those above the rank of supervisor, office and sales staff, persons regularly employed for not more than (24) hours per week and persons covered by subsisting collective agreements.

The applicant estimates there to be seven employees coming within that unit. The respondent's reply describes a bargaining unit which it claims to be appropriate for collective bargaining which includes clerical and sales staff and excludes specifically dispatchers, amongst other classifications not here relevant. The significance in the differences between the two descriptions is that the applicant's bargaining unit description would include only the respondent's full-time dispatchers, whereas the unit described by the respondent would include all presently unrepresented, full-time clerical and sales staff, but excluding its full-time dispatchers.

4. The parties had discussed with a Board Officer the issues raised by the differences in their respective bargaining unit descriptions prior to coming before the Board. At the outset of the hearing, respondent counsel advised the Board that it was challenging the appropriateness of the applicant's bargaining unit description on two grounds. First, the description is one of a unit comprised only of full-time dispatchers employed by the respondent and dispatchers alone would not constitute a unit of employees appropriate for collective bargaining purposes. Second, in any event, the dispatchers exercise managerial function within the meaning of section 1(3)(b) of the *Labour Relations Act* and should be excluded from any bargaining unit which might be found by the Board to be appropriate. The parties were prepared to have the Board authorize an Officer to inquire into those two issues and to put their evidence before the Officer. The Board instead asked to hear the representations of the parties on the issues.

5. The facts asserted by respondent counsel in his representations may be summarized as follows:

- (1) The applicant and respondent are parties presently to two collective agreements covering some of the respondent's Hamilton employees. These are its in-car driver instructors and its tow truck operators. These are two separate bargaining units resulting from two separate certificates issued previously by the Board, although the Board's record shows that the bargaining units were described in the certificates issued in different terms than in the current collective agreements. The bargaining unit comprised of the respondent's Hamilton tow truck operators excludes dispatchers. The Board's decision certifying the applicant to represent the tow truck operators does not state on what basis the dispatchers were excluded from the unit but the Board's record does reveal that the application described a bargaining unit to exclude dispatchers and the respondent did not oppose that aspect of the bargaining unit description. The parties are currently bargaining for renewal of both collective agreements.
- (2) The in-car driver instructors are employed in the respondent's driver education department and the tow truck operators are employed in its emergency road service department. The drivers were the first of the respondent's Hamilton employees to be organized by the applicant. These two departments, together with the other departments of the respondent's business ultimately report to its executive vice-president and general manager. He has direct responsibility for the marketing department and has reporting to him as well two vice-presidents. The manager of road services and the manager of driver education report to the same vice-president, as do four other departments. The other

vice-president has the respondent's travel agency and the membership services, licensing, accounting and caretaking departments and the printer reporting to him.

- (3) The respondent's business is subject to seasonal fluctuations and most significantly so with respect to the emergency road services. Calls from members for emergency road service are received by employees classified as receivers. Depending upon the seasonal work load, there may be from two to twelve receivers on duty on any one shift. They work in the same room as the dispatchers. Member's requests for road service are passed to the dispatchers who then dispatch either one of the club's own tow truck operators or a tow truck from one of the garages with which the respondent contracts for service. Because of the seasonal nature of the work and variable daily demands, all dispatchers receive calls from members for emergency road service much of the time as well as dispatching tow trucks to meet those requests. Because the work force in the road services department fluctuates with the work load, the respondent establishes a schedule for the receivers. In the winter time, if the conditions demand it, virtually all of the respondent's employees can be called upon to supplement the receivers and dispatchers in order to fulfill the work schedule for receiving member's calls.
- (4) The respondent occupies a building comprised of three floors. The room in which the dispatchers and the receivers work is located at the basement level. That floor is occupied by the road service and driver education departments, the managers of those departments and their clerical staffs. The main floor is occupied by the respondent's travel agency, road touring services and other membership services. The top floor houses the executive offices and administrative activities of the respondent.
- (5) The dispatchers have a number of additional duties besides receiving calls for emergency road services and dispatching trucks to service those calls. They complete daily reports with respect to their dispatching activities. When they are not busy, they assist with the routine clerical work associated with membership services such as assembling materials for general mailings, stuffing envelopes and mailing cheques to members. They receive and are responsible for the cash collected by the tow truck operators for gasoline and minor parts supplied to motorists who have received emergency road services. They are responsible for the respondent's physical premises during the periods when the respondent's business offices are closed. The dispatchers control the issuing of stock carried on the respondent's tow trucks and supplied to its contract garages as well as controlling the access of tow truck operators to the gasoline pumps on the respondent's premises. During the hours when the respondent's business offices are closed, the dispatchers handle information calls from prospective members as well as from members who make use of the

respondent's credit card registry. In this latter respect, if a member phones in reporting a loss of his credit cards, the dispatchers record the information on the required forms. They prepare for the signature of the manager of road services cheques to reimburse members who have had to arrange for their emergency road services from a source other than the respondent. Dispatchers decide whether to employ contract garages to serve customers' emergency road services calls and whether to authorize towing services additional to those normally provided by the respondent. Decisions to do either results in extra cost to the respondent.

- (6) The dispatchers report to the manager of road services, as do the receivers and the fleet supervisor. The dispatchers have supervisory responsibilities with respect to the tow truck operators and the receivers. With respect to the tow truck operators, the dispatchers are authorized to send them home if there is no work or to call extra operators in if help is needed to cover the work load. They assign the tow truck operators to their jobs and are the persons in the best position to know what the operators are doing on a daily basis. Dispatchers are authorized to adjust the operators' work schedule if an operator needs time off. With respect to the receivers, the dispatchers supervise the work of the receivers who are on shift with them. The dispatchers are required to report to higher authority any deficiencies in the work performance of the tow truck operators and the receivers.
- (7) The dispatchers are paid for the hours which they work compared with the other office and sales staff who are paid on a salary. The benefits provided to dispatchers are the same benefits as are provided to office and sales staff and are different from the benefits paid to employees in the two bargaining units.

6. The applicant did not dispute the facts asserted by respondent counsel, but contends that dispatchers don't exercise managerial function. Their work is not clerical in nature and they are a group separate and apart from the clerical and sales staff. The applicant takes the position that the primary function of dispatchers is to direct the tow truck operators on the road and, therefore, no special significance should be attached to the fact that they report any sub-standard performance of the operators, it being a natural consequence of the function of dispatching operators to their jobs to do so.

7. The representative of the objectors, who has been employed by the respondent as a full-time dispatcher for 5 1/2 years, agreed that the facts asserted by respondent counsel were accurate overall. He specifically agreed that dispatchers are in charge of the physical security of the premises when the business offices are not open and that there is lot of clerical work associated with the dispatcher's job.

8. If the Board were to assume, without finding, that dispatchers do not exercise managerial function, the Board is satisfied on the undisputed facts asserted by the respondent that dispatchers share a greater community of interest with office and sales staff than with tow truck operators. Furthermore, there are already two bargaining units: tow truck operators and

in-car driver instructors. If the dispatchers were to be carved out of the remaining unrepresented employees, it would mean that there would be a minimum of four full-time bargaining units possible. The respondent employs also a significant number of part-time employees, so there is a potential for additional bargaining units of part-time employees which would be the mirrorimage of the full-time units. This opportunity for fragmentation of the respondent's Hamilton employees into multiple bargaining units would not be conducive to sound collective bargaining.

9. Section 6(1) of the Act gives the Board broad discretion to determine bargaining units which are appropriate for collective bargaining. In the circumstances before the Board in this application, the Board is satisfied that a bargaining unit composed solely of dispatchers would not be appropriate for collective bargaining purposes.

10. The applicant stated unequivocally at the hearing that it was seeking to represent dispatchers only, a statement supported by the application and the documents filed in support of it. It is reasonable to infer from that statement and from the membership documents filed that the applicant confined its organizing campaign to dispatchers. The applicant does not claim that there is any other appropriate bargaining unit which would include dispatchers. Therefore, since the Board has found that a unit comprised only of dispatchers is not appropriate for collective bargaining purposes, this application is dismissed.

1352-83-U United Steelworkers of America, Complainant, v. John T. Hepburn, Limited, Respondent

Practice and Procedure – Unfair Labour Practice – Employee discharged during strike – Whether employee's rights waived as part of collective agreement settlement – Unreasonable delay of eleven months in filing complaint – Board not refusing to entertain complaint in absence of evidence of prejudice to respondent

BEFORE: Owen V. Gray, Vice-Chairman, and Board Members J. Wilson and C. A. Balentine.

APPEARANCES: *Brian Shell, George Teal and Carlos Infusino for the applicant; Stewart D. Saxe, John F. Hepburn and William Hutchison for the respondent.*

DECISION OF THE BOARD; January 27, 1984

1. This is a complaint under section 89 of the *Labour Relations Act*. The complainant trade union alleges that the respondent violated sections 3, 15, 64 and 66 of the *Labour Relations Act* when it terminated the employment of Roderick Smith on June 11, 1982, following a picket line incident in which Mr. Smith was involved, and then in subsequent collective bargaining steadfastly rejected any proposal that a new collective agreement expressly provide for arbitration of Smith's discharge.

2. It is common ground that the last collective agreement between these parties expired

May 18, 1982, and that the complainant's strike commenced on that day. The strike continued until November 18, 1982, when the parties appear to have settled on the terms of a new collective agreement which made no express provision for the arbitration of the "justness" of Smith's termination.

3. The complainant nevertheless filed a grievance on Smith's behalf on November 23, 1982. The respondent's immediate response was that there was no collective agreement in effect as of the time of the termination, and that the termination could not, therefore, be the subject of collective agreement arbitration. The complainant persisted. It advised the respondent it had appointed a nominee to an arbitration board. That nominee then sought from the respondent the name of its nominee. The respondent refused to appoint a nominee. The complainant then asked the Minister of Labour to make the appropriate appointments pursuant to section 44(4) of the Act. Correspondence was exchanged between counsel for the Ministry, the complainant and the respondent concerning the Minister's power to make the requested appointments. On March 22, 1983, the Director, Legal Services, Ministry of Labour advised counsel for the complainant that he would be advising the Minister of Labour that he had no power to appoint an arbitrator under subsection 44(4) of the Act, having regard to the undisputed fact that the discharge took place when no collective agreement was in operation.

4. There were no further developments until after the release by the Board of its August 5, 1983 decision in *International Wallcoverings*, [1983] OLRB Rep. Aug. 1316. In late August or early September, counsel for the complainant met with the Director, Legal Services, Ministry of Labour, and ultimately obtained from him a letter which confirmed that the Minister had accepted the advice that counsel had earlier been told would be given to the Minister on the question of power to appoint an arbitrator under section 44(4). This complaint was then filed September 19, 1983, fifteen months after Smith's termination.

5. The respondent raised the complainant's delay in filing this complaint as a preliminary objection to the Board's proceeding to hear the complaint on its merits. A number of the Board's decisions were cited, including: *Chrysler Canada Ltd.*, [1983] OLRB Rep. Apr. 490; *The Corporation of the City of Mississauga*, [1982] OLRB Rep. Mar. 420; *Sheller-Globe of Canada Ltd.*, [1982] OLRB Rep. Jan. 113 (judicial review denied at 42 O.R. (2d) 73 (Div. Ct.)); *Irving Posluns Sportswear*, [1979] OLRB Rep. Oct. 986; *Concrete Construction Supplies*, [1979] OLRB Rep. Aug. 739 and [1982] OLRB Rep. Oct. 1446; *Inco Metals*, [1982] OLRB Rep. May 681; *Nelson Quarry Operation of Genstar Stone Products Inc.*, [1983] OLRB Rep. Sept. 1531; *Donato Marinaro et al*, [1983] OLRB Rep. Oct. 1699; *Sonic Transport Systems Limited*, [1981] OLRB Rep. Oct. 1483; and, *Decor Wood Specialties Limited*, [1974] OLRB Rep. Mar. 136. Counsel argued that these decisions reflect the Board's concern for expedition in the filing of unfair labour practice complaints and establish a time limit well short of 15 months within which complaints are to be filed. Counsel argued that the same concern is reflected in the various statutory time limits of 6 months or less found in the Canada Labour Code and in labour legislation in the provinces of Quebec, Nova Scotia and Manitoba. With reference to the facts of this case, counsel argued that the delay could not be explained by a lack of awareness on the complainant's part of the existence of rights and remedies under the *Labour Relations Act*. Counsel argued there would be an impact on the relationship between the parties if we were to entertain the complaint, because the Smith grievance had been dealt with extensively in bargaining and was, he argued, settled as part of the November 1982 settlement of the strike. Counsel said there had been major changes in the relationship of the parties as a result. Counsel also argued that delay leads to changed

circumstances, dimming of memory and other adverse effects on the ability of any respondent to defend an unfair labour practice complaint.

6. Counsel for the complainant took issue with the suggestion that it had agreed in the November, 1982 settlement that Smith's discharge would not be the subject of litigation thereafter. Counsel for both parties provided us with copies of the last correspondence exchanged before the memorandum was signed. In his letter of November 12, 1982, the respondent's spokesman wrote:

In order to clarify any confusion still existing between the parties we expect the *Union's* assurances that in signing the Memorandum they have withdrawn any and all proposals

(a) relating to the disposition of Mr. Rod Smith's discharge and

(b) relating to "laid-off" employees,

and that neither of these issues are or will be the subject of further discussions or negotiations between the parties.

On November 13, 1982, the complainant's spokesman replied by telegram:

FURTHER TO YOUR LETTER DATED NOVEMBER 12, 1982 TO ME, PLEASE BE ASSURED BY THE UNION THAT IN SIGNING THE MEMORANDUM OF SETTLEMENT THE UNION HAS WITHDRAWN PROPOSALS RELATING TO THE DISPOSITION OF ROD SMITH'S DISCHARGE AND RELATING TO THE "LAID OFF" EMPLOYEES. WE NOTE THAT THE MEMORANDUM DOES NOT INCLUDE ANY RIGHT FOR RODERICK SMITH TO RETURN TO WORK *AND THAT THE COMPANY RESERVES THE RIGHT TO OBJECT TO THE ARBITRABILITY OF ANY GRIEVANCE WHICH MAY BE FILED IN RESPECT OF THE DISCHARGE OF RODERICK SMITH.*

(emphasis added)

This falls far short of constituting a complete release of any claim Smith might have. Indeed, it is not even an undertaking to forbear filing a grievance. It merely acknowledged the respondent's right to object to the arbitrability of a grievance, which would be unnecessary if the filing of a grievance were no longer a possibility.

7. Counsel for the complainant submitted that the Board has been concerned, in its decisions on delay, with the prejudice caused by delay and the abuse of process inherent in the rekindling of something that has been dead. He noted that the "victim" of the incident which led to Smith's dismissal was present in the hearing room, which suggested that the respondent had no difficulty securing evidence with respect to that incident. The complainant's intention to litigate the propriety of that discharge was made apparent to the respondent within days after the completion of the November 1982 settlement. Counsel sought to explain the

delay following March 31, 1983 as resulting from a belief that the issues raised with the Ministry up to that point were still under consideration by the Minister. Counsel for the complainant took issue with the assertion that there had been major changes in the parties' relationship as a result of the supposed resolution of the Smith issue. He suggested there had been no such changes.

8. Counsel for the complainant acknowledged that delay might go to remedy and result, for example, in denial of compensation for the period of delay. He observed that if Smith had not been terminated, he would be on layoff. Accordingly, the appropriate remedy in this case, he said, might only involve reinstatement of the grievor to the appropriate position on the layoff list. Counsel for the respondent acknowledged that employees senior to Smith were currently on layoff.

9. The *Labour Relations Act* does not prescribe a period within which unfair labour practice complaints must be filed in order to warrant the attention of the Board. Instead, the Board is given a broad discretion to determine whether or not it will inquire into any particular complaint. The cases cited by counsel deal with the influence of delay in the filing of a complaint on the exercise of the Board's jurisdiction to inquire into the complaint. What emerges clearly from a review of that jurisprudence is this: each case is decided on its own particular facts, and the length of the delay is only one of several factors taken into account in the exercise of the Board's discretion.

10. The Board generally does not refuse to entertain a complaint under section 89 unless there has been "extreme" delay. Delay which is unreasonable but not extreme is normally taken into account when considering the extent of compensation or other relief to be given if the complaint succeeds on its merits: *CCH Canadian Limited*, [1977] OLRB Rep. June 351 at ¶3; *Concrete Construction Supplies*, [1979] OLRB Rep. Aug. 739 at ¶5. For example, the prejudice caused by delay in filing an improper discharge complaint may lie primarily in the respondent's increased exposure to compensation. Denial of compensation for the period of excess delay will ordinarily redress that prejudice adequately: *Decor Wood Specialties Limited*, [1974] OLRB Rep. Mar. 136; *Sonic Transport Systems Limited*, [1981] OLRB Rep. Oct. 1483; *Donato Marinaro et al*, *supra* at ¶13, 14 and 15. Where the relief which should be denied in the exercise of this discretion is the only relief to which the complainant might have been entitled but for his delay, the Board will not engage further in what would then be an academic inquiry: *Donato Marinaro et al*, *supra* at ¶16.

11. The prejudice to the party or parties innocent of the delay may be of a sort which cannot be ameliorated by limiting the relief to be granted if the complaint is successful. Delay may prejudice the defense of a complaint. With the passage of time recollections fade, witnesses may move away or die, and documents may be lost or destroyed in the ordinary course of business. The potential for prejudice of this kind obviously depends in large part on the extent to which the observations or documents relevant to the complaint were noteworthy at the time they were made, or became so within a reasonable time thereafter. The ability to defend action such as a firing, which is inherently controversial at the time it takes place, is less likely to suffer from the passage of time than the ability to defend, for example, the day-to-day referral decisions of a trade union official running a hiring hall. Conduct which is not by its nature remarkable or memorable at the time it occurs is difficult to defend after a long delay unless some early challenge or threat of litigation alerted the potential respondent to the possibility of later contention and thereby afforded an early opportunity to reflect, record and

preserve evidence. The weight to be given to actual or potential defense prejudice depends on the particular circumstances of the case. The relative ability of a complainant to recall the events of which he complains in enough detail to adequately particularize them in his complaint or evidence in chief is one measure of the prejudice which delay may have caused to the defense of the complaint (see *Irving Posluns Sportswear, supra*). Defense prejudice will be apparent, and the weight to be given it substantial, if witnesses have died and documents have been destroyed: *Chrysler Canada Ltd., supra*.

12. The Board has recognized another sort of prejudice which can be caused by delay in filing employee complaints of unfair representation in violation of section 68 of the Act: the prejudice to the collective bargaining relationship of employer and trade union which can result from the delayed litigation and attempted enforcement of collective agreement rights. This special concern was described in *Caravelle Foods*, [1983] OLRB Rep. June 875 at paragraph 9 in the following terms:

... The nature of delay is assessed not only on the basis of time elapsed but the effect on labour relations or a collective-bargaining relationship if the complaint is entertained when there is no remedy to be given or the remedy would be deleterious to the relationship. In *Sheller-Globe*, [1982] OLRB Rep. Jan. 113, the Board summarized the test in a section 68 complaint as follows, at paragraph 13:

... The Board has always been conscious of the need for expedition in its practices and procedures. The delay in the present case raises concerns over an appropriate remedy, if the Board *were* to permit this complaint to now proceed, which are not fully answered by the complainant's concession as to damages. In circumstances such as the present, the onus shifts to a complainant to satisfy the Board that there are compelling labour relations reasons to cause the Board to exercise its discretion and entertain the complaint under section 89.

The thread running through all the section 68 cases dealing with delay is a concern as to the effect of the process and/or the remedy on the collective-bargaining relationship. This is because the remedy sought has usually been a demand for arbitration or restoration of lost rights, not only for monetary compensation. These remedies require the parties to the collective-bargaining agreement to do battle over an individual's rights which they have both considered no longer an issue in their relationship because of an elapse of time. The Board's general approach is summarized in *The Corporation of the City of Mississauga*, [1982] OLRB Rep. March 420, (also a section 68 complaint) at paragraphs 21 and 22 as follows:

21. In recognition of the fact that it is dealing with statutory rights, the Board has not, heretofore, adopted any rigid practice with respect to the matter of delay – holding, in most cases, that it will simply take this matter into account in determining the remedy if a statutory violation is established. However, whatever the merits of this approach, the Board must also keep in mind the potentially corrosive

effect which litigation can have upon the parties' current collective bargaining relationship – quite apart from the outcome.

Adversarial relationships are pervasive enough in our industrial relations system without the resurrection of ghosts from the past. In the Board's view, the orderly conduct of an ongoing collective bargaining relationship and the necessity of according a respondent a fair hearing both require that unions, employers and employees recognize a principle of repose with respect to claims that have not been asserted in a timely fashion. If such claims are not launched within a reasonable time, the Board may exercise its discretion pursuant to section 89 and decline to entertain them.

22. A perusal of the Board cases reveals that there has not been a mechanical response to the problems arising from delay. In each case, the Board has considered such factors as: The length of the delay and the reasons for it; when the complainant first became aware of the alleged statutory violation; the nature of the remedy claimed and whether it involves retrospective financial liability or could impact upon the pattern of relationships which has developed since the alleged contravention; and whether the claim is of such nature that fading recollection, the unavailability of witnesses, the deterioration of evidence, or the disposal of records, would hamper a fair hearing of the issues in dispute. Moreover, the Board has recognized that some latitude must be given to parties who are unaware of their statutory rights or, who through inexperience take some time to properly focus their concerns and file a complaint. But there must be some limit, and in my view unless the circumstances are exceptional or there are overriding public policy considerations, that limit should be measured in months rather than years.

In *Caravelle Foods* the Board decided to hear a section 68 complaint notwithstanding a delay of some eight months in filing it, because the Board concluded there was no evidence of defense or labour relations prejudice which could not be adjusted adequately in the framing of any remedial order.

13. The length of the delay is sometimes not easily measured. In many cases, the conduct complained of will constitute an unfair labour practice only if it is shown to be improperly motivated. The motivation may not be immediately apparent; indeed, it will often be carefully concealed. It will ordinarily be the course of the wrongdoer's conduct over a period of time from which the complainant and, later, the Board infer an underlying motivation. At what point does the "delay" clock begin to run in such cases? Surely only when the complainant knew or ought reasonably to have known of the basis for the complaint. What of a complaint alleging that a series of incidents occurring over time, each minor when considered in isolation from its context, together represent the result of an improper scheme? At what point in the furtherance of such a scheme will the victim's continued patience be later turned against him? The line is not easily drawn. This does not mean that the Board will always permit unrestrained exploration of the entire history of a collective bargaining or employment relationship in the guise of setting the scene for or exposing the origins of the respondent's

alleged scheme or motivation. The Board may limit the inquiry's reach back into time if it appears the major object is to resurrect in a new guise old complaints and grievances which had earlier been formulated and waived or abandoned short of settlement or adjudication: *Nelson Quarry Operation of Genstar Stone Products Inc.*, *supra*.

14. The Board's approach to delay has been compared to the doctrine of laches developed by Courts of equity and adopted by boards of arbitration: *The Corporation of the City of Mississauga*, *supra*, at ¶20; *Concrete Construction Supplies*, [1982] OLRB Rep. Oct. 1446 at ¶28. The features of this doctrine were explained in *Re Parking Authority of Toronto*, (1974) 5 L.A.C. (2d) 150 (Adell) (judicial review denied (1974) 4 O.R. (2d) 45 (Ont. Div. Ct.)), in the following terms at pp. 156-157:

The employer's final point may be stated as follows: even if the use of "part-timers" has been in breach of the collective agreement, and even if the continuing nature of that breach means that the time limit provisions of the agreement do not prohibit the board from considering this grievance, the union's long delay in enforcing its rights and the detriment which the employer has suffered from that delay are sufficient to preclude the bringing of the grievance. The employer is thus invoking the equitable doctrine of laches, which has been stated in these terms (14 Hals., 3rd ed., p. 641):

... In determining whether there has been such delay as to amount to laches the chief points to be considered are (1) acquiescence on the plaintiff's part, and (2) any change of position that has occurred on the defendant's part. Acquiescence in this sense does not mean standing by while the violation of a right is in progress, but assent after the violation has been completed and the plaintiff has become aware of it. It is unjust to give the plaintiff a remedy where he has by his conduct done that which might fairly be regarded as equivalent to a waiver of it; or where by his conduct and neglect he has, though not waiving the remedy, put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted. In such cases lapse of time and delay are most material. Upon these considerations rests the doctrine of laches.

Laches is a doctrine of equity rather than of the common law. This does not mean that it enables a tribunal to refuse to give effect to legal rights in any case where the circumstances make the tribunal feel that it would be unfair or, in the commonly used sense of the term, "inequitable" to give effect to them. What it does mean is that if certain quite specific prerequisites developed by Courts of equity are present in the particular case, the party with the legal right may be barred from enforcing it. The tribunal's sense of justice is permitted to come into play only *after* those specific prerequisites are found to be satisfied, and not *before*. The spirit in which equitable defences such as laches are to be used, once the prerequisites are established, is made clear by the English equity scholar, Professor H. G. Hanbury. (Hanbury, *Essays in Equity*, Oxford, 1934, p.65):

... equity will, on grounds of conscience and fair dealing, systematically deprive this or that individual, in certain given circumstances, of the enjoyment of his legal rights, not for a moment disputing the validity of the legal rights in general, but isolating the individual from them in order to avoid injustice to another to whom it will extend its protection.

Similarly, in *Re Civic Employees Union, Local 43, and City of Toronto* (1967), 18 L.A.C. 273 (Arthurs), at p. 280, an arbitration board, in considering the applicability of other equitable defences (waiver and estoppel), pointed out that the "essence" of those doctrines was "the prevention of unfairness". What we must do, then, in deciding whether to give effect to the employer's plea of laches, is to ask first whether the specific requirements of the doctrine of laches have been made out here, and if so, whether the application of that doctrine is needed to avoid injustice or unfairness.

The two principal prerequisites for the applicability of laches are, as is made clear in the above passage from Halsbury, acquiescence on the part of the party charged with the delay and some detriment ("change of position") on the part of the other party.

In the exercise of its discretion under section 89(4) of the Act, the Board is not limited to application of the courts' formulation of the doctrine of laches. The doctrine is a useful guide to the exercise of that discretion, however, and the explanation set out in the passage just quoted highlights the type of balancing of interests in which the Board must also engage in exercising its discretion.

15. As on a motion to dismiss for failure to set up a *prima facie* case for relief, we must assume the truth of the complainant's factual allegations. The respondent did not argue that those allegations, if proved, would not establish a breach of the Act. In determining whether the delay in filing this presumptively meritorious claim makes it unfair for us to entertain it, we should not weigh in our balance the plausibility of the complainant's assertions. What is in question is whether an inquiry into this complaint would be unfair to the respondent *by reason of the delay in asserting it*; any supposed unfairness in subjecting a respondent to the defense of a complaint which alleges a *prima facie* case but appears unlikely to succeed is no more relevant in this context than it would be if there had been no delay.

16. Turning now to the facts of this case, we note that the delay of which the respondent complains has three phases. The first is the period from the Smith termination in June 1982 to the settlement of the strike. It was not unreasonable for the complainant to concentrate its efforts during that period on trying to achieve in bargaining a resolution or procedure for resolving Smith's "grievance". That phase of the "delay", therefore, was not unreasonable. The material before us does not establish that the Smith grievance was settled at that point. The next phase begins with the filing of a grievance purportedly under the new non-retroactive collective agreement. Whatever else may be said about the complainant's attempts during this second phase to make Smith's termination the subject of an arbitration, nothing in that conduct up to the end of March, 1983, could have led the respondent to believe that the complainant no longer wished to challenge that termination. With respect to the period after March, 1983,

on the other hand, we do not accept as reasonable the complainant's explanation that it thought the matter was still under consideration by the Minister of Labour. There was nothing in the last correspondence from the Minister's legal advisor to suggest that the matter was going to be considered further. While in retrospect we know the complainant had lapsed into inactivity at the end of March, 1983, this would not have been instantly obvious to the respondent. From its point of view the appearance of inactivity would have coalesced gradually with the passage of time and absence of correspondence. From this point of view, the second phase fades after March rather than ending abruptly. The following third phase ends when the complaint is filed. The second and third phases both constitute unreasonable delay. We do not accept the argument that arbitration offered a more comprehensive remedy than a section 89 complaint at that point, when there was serious doubt that a grievance was arbitrable. Even if arbitration was the avenue of redress with the greatest potential, lack of success in another litigious forum will not justify an otherwise unacceptable delay in filing a complaint: *Sheller-Globe of Canada Ltd.*, *supra*.

17. In the result, we have an unreasonable delay totalling about eleven months. The prejudice to the respondent is slight at best in the first half of this period, while the complainant was trying to contest roughly the same issues against the same respondent but in another forum. Only in the last five or six months before the complaint was filed did inactivity create any potential for prejudice and adverse reliance. There is no allegation, however, that any of the respondent's witnesses or documents were lost in that period or, indeed, at any relevant point. There is nothing in the material before us to suggest that the respondent relied on the complainant's subsequent inactivity in any way which would make it unfair for the complainant to now press a meritorious complaint before this Board.

18. In short, we are not persuaded that the complainant's delay in filing this complaint justifies a refusal to hear it on its merits. The respondent's request for dismissal is, therefore, denied. That will not, however, be our last consideration of the complainant's delay. If the complaint is successful on the merits, the delay will be considered in assessing what relief to award, *if any*.

19. While the disposition of the respondent's motion brings to an end the assumption that the complainant's allegations of wrongdoing are true, it does not bring to an end the potential influence of the complainant's delay on the disposition of this complaint. The case the complainant wishes to establish is that termination was so extreme a response to the actual incident in which Smith had been involved as to lead us to conclude that the respondent had seized upon that incident as an opportunity to rid itself of a militant trade union leader. During argument, counsel for both parties emphasized the bitterness which had characterized their clients' relationship during the strike. As we understand it from counsel's answers to the Board's questions, at no time prior to the filing of this complaint did anyone on behalf of the trade union directly accuse the respondent employer of anti-union motivation in its termination of Smith or put it on notice that there would be resort to this Board if arbitration were unavailable. It might be argued that the absence of such an accusation in an otherwise bitter relationship suggests that it had not occurred to anyone on behalf of the trade union that the Smith termination was motivated by anti-union animus. The trade union's delay in characterizing the respondent's behaviour as an unfair labour practice may be some measure of the accuracy of the charge. The doubt cast on the merits of the complaint by the delay in filing

it must, of course, be weighed together with all the evidence the parties have to present on the merits.

2195-83-R Ronald Lewszoniuk, Complainant, v. International Union of Operating Engineers, Local 793, Respondent

Duty of Fair Referral – Duty of Fair Representation – Practice and Procedure – Unfair Labour Practice – Dependent Contractor not within union’s bargaining unit – No duty of fair representation applying – Union not engaged “selection etc. to employment” – Board not watch-dog over internal union affairs – No authority to enforce provisions of ILO regulations, union constitution or Canadian Constitution – Complaint substantially similar to complaint dismissed by Board in prior decision – Dismissed without hearing on merits

BEFORE: R. D. Howe, Vice-Chairman.

APPEARANCES: Dorothy Foran and Ron Lewszoniuk for the complainant; B. Fishbein, J. Redshaw, E. A. Ford and W. Pedder for the respondent.

DECISION OF THE BOARD; January 13, 1984

1. This is a complaint under section 89 of the *Labour Relations Act*.
2. On January 9, 1983, the Board gave the following oral decision in respect of this complaint, which decision is hereby confirmed:

In Board File No. 2509-82-M, the Board, differently constituted, found that Arlington Crane Service Limited (“Arlington”) had contravened Article 3.4(b) of the provincial collective agreement binding upon Arlington and the respondent trade union (the “Union”), by subcontracting work covered by that collective agreement to the complainant, Ronald Lewszoniuk, who did not (and still does not) have an “Agreement” with the Union within the meaning of that provision. Mr. Lewszoniuk subsequently sold his crane and ceased to perform work for Arlington.

In the present complaint Mr. Lewszoniuk alleges that he has been dealt with by the Union contrary to sections 68 and 69 of the *Labour Relations Act*, and requests, by way of relief, that his crane be replaced and that losses of revenue of \$40,000 accounts receivable be paid to him by the Union. He also alleges that the Union has violated its International Constitution, the regulations or standards of the International Labour Organization, and the *Constitution Act, 1982*. However, as submitted by counsel for the Union in his preliminary motion for dismissal, this Board has only such jurisdiction as has been conferred upon it by the Ontario Legislature by statute. It has no authority under the *Labour Relations Act* (or any other Ontario statute) to undertake any sort of watch-dog role

over a union's internal processes under its constitution, nor does it have any general jurisdiction to enforce the standards or regulations of the International Labour Organization or the provisions of the *Constitution Act, 1982* (although the Board will interpret and apply the terms of the *Canadian Charter of Rights and Freedoms* when faced with a challenge to its jurisdiction based upon that Charter: see, for example, *Third Dimension Manufacturing Limited*, [1983] OLRB Rep. Feb. 261, in which the Board ruled that the "reverse onus" provisions of section 89(5) do not contravene the presumption of innocence provisions of the *Canadian Charter of Rights and Freedoms*). While the complainant may be able to seek in another forum (such as the Courts) remedies on those bases, to succeed before this Board in the present complaint he must establish a breach of sections 68 or 69 of the *Labour Relations Act*.

Although the complaint as filed is severely lacking in particulars, the complainant was afforded an opportunity on January 9, 1984 to provide the Board with the details of his complaint, in response to Union counsel's motion for dismissal of the complaint under section 71 of the Board's Rules of Procedure. The complainant was also called upon by the Board to indicate how his complaint differs from the complaint of Peter Walter Dow, which was dismissed by the Board in June of 1981 in a detailed decision reported under the name *International Union of Operating Engineers, Local 793*, [1981] OLRB Rep. June 692.

Assuming that all of the facts alleged by the complainant in his complaint and in the oral submissions made to the Board on his behalf can be duly proven, I am of the view that this complaint should be dismissed without a hearing on the merits, pursuant to my discretion under section 89(4) of the *Labour Relations Act* and under section 71 of the Board's Rules of Procedure. There are no legally material differences between the facts alleged by the complainant and the facts set forth in the Board's decision with respect to the complaint of Peter Walter Dow against the Union. I agree with and hereby adopt the reasoning and conclusions set forth in that decision, in which the Board dismissed a substantially similar complaint based upon what are now sections 68 and 69 of the Act (then sections 60 and 60a). As was the case with Mr. Dow, it is apparent from the facts alleged by Mr. Lewszoniuk that he was not, at any material time, an employee in a bargaining unit represented by the Union. Thus, the complainant cannot rely on section 68 in regard to the impugned actions of the Union since the complainant does not fall within the ambit of section 68, which, by its express terms, applies only to representation of employees in a bargaining unit (see the *Dow* decision at paragraphs 29-36, and see also *Keith MacLeod Sutherland*, [1983] OLRB Rep. July 1219). Similarly, for the reasons set forth in paragraphs 37 and 38 of the *Dow* decision, the complainant's case cannot succeed under section 68 of the Act since the Union is not engaged in the "selection,

referral, assignment, designation or scheduling of persons to employment” pursuant to a collective agreement, in respect of owner-operators (or dependent contractors) such as the complainant.

For the foregoing reasons, this complaint is hereby dismissed.

1556-82-M The Toronto-Central Ontario Building and Construction Trades Council on its own behalf and on behalf of The International Association of Heat and Frost Insulators, Local 95; The Marble Tile and Terrazzo Workers Union, Local 31; The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46; and The Labourers’ International Union of North America, Local 506, Applicants, v. **M. J. Guthrie Construction Limited** and Rosedale Construction, Respondents

Bargaining Rights – Collective Agreement – Construction Industry – Construction Industry Grievance – Trade Union – Voluntary Recognition – Toronto – Central Ontario Building and Construction Trades Council not trade union or certified council of trade unions – Not competent to enter into collective or recognition agreement in own name – Working agreement having effect of creating series of recognition agreements on behalf of council’s affiliates – Whether union can acquire bargaining rights at time when no employees employed – Whether working agreement satisfying Act’s requirements for recognition agreement

BEFORE: R. A. Furness, Vice-Chairman, and Board Members H. Kobryn and E. J. Brady.

APPEARANCES: *Alex Ahee and James David Johnson for the applicants; Brian P. Smeenk and M. J. Guthrie for the respondents.*

DECISION OF THE BOARD; January 25, 1984

1. The applicants have referred a grievance concerning the interpretation, application, administration or alleged violation of a collective agreement to the Board for final and binding arbitration.
2. The applicants have alleged that M. J. Guthrie Construction Limited (“Guthrie”) is signatory to and bound by the working agreement of The Toronto-Central Ontario Building and Construction Trades Council (the “Council”) and that Rosedale Construction (“Rosedale”) is a proprietorship under the direction of Mr. M. J. Guthrie.
3. It is the position of the applicants that Guthrie and Rosedale constitute one employer for the purposes of the Act by virtue of a decision of the Board dated September 27, 1982 (see Board File Nos. 2524-81-R and 0144-82-M). It is the position of the applicants that Guthrie, by signing the working agreement with the Council has voluntarily recognized the applicant trade unions and any other trade unions which are affiliated to the Council. It is also

the position of the applicants that Guthrie is bound by the operation of section 147 of the Act to such provincial agreements as also bind affiliates of the Council.

4. The applicants have alleged that on the St. Williams School project (the “project”), in the City of Toronto, Guthrie violated the aforesaid provincial agreements in that it has (a) employed persons who are not members of the applicant trade unions in violation of their provincial collective agreements, and (b) engaged the use of subcontractors who were not in collective bargaining relationships with the applicant trade unions.

5. The applicant trade unions have requested that the Board direct that (i) Guthrie abide by the provincial collective agreements of the affiliates of the Council as they apply to the industrial, commercial and institutional sector, and (ii) Guthrie be directed to pay compensation and damages to the applicant trade unions for violating their respective provincial collective agreements on the project.

6. In its reply, the respondents disputed that counsel for the applicants had been retained by each and every named applicant. It was the position of the respondents that the previous grievance was dismissed and that, since the previous grievance concerned the same conduct complained of in the instant grievance, the matter was *res judicata* and the applicants were estopped from pursuing this matter.

7. The respondents denied that it was bound by any collective agreement applicable to the work in question to which any of the applicants are a party. The respondents further denied that work had been subcontracted on the project in violation of any of the provincial collective agreements to which any of the applicants are a party. The respondents also denied that any of the applicants suffered any damages as a result of any alleged violations of any collective agreements and put each and every applicant to the strict proof thereof. The respondents requested the Board to dismiss this referral under section 124.

8. The names of the applicants appearing in the style of cause of this referral are hereby amended to read: “The Toronto-Central Ontario Building and Construction Trades Council on its own behalf and on behalf of The International Association of Heat and Frost Insulators, Local 95; The Marble, Tile and Terrazzo Workers Union, Local 31; The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46; and The Labourers’ International Union of North America, Local 506”.

9. The working agreement referred to by the parties reads as follows:

WORKING AGREEMENT

Agreement dated the March 10th day of A.D. 1960.

Between:

M.J. Guthrie Construction Ltd.,
8 Arden Crescent, Scarborough, Ont.
PL. 5-1822

hereinafter referred to as "The Company"

- and -

The Building and Construction Trades Council of Toronto and Vicinity

hereinafter referred to as "The Council"

The parties hereby expressly covenant and agree as follows:

PURPOSE

1. The general purpose of this agreement is to establish mutually satisfactory relations between the Company and its employees; to eliminate unfair practices; to establish and maintain satisfactory working conditions, hours of work and wages and to stabilize and encourage the construction industry.

RECOGNITION

2. The Company recognizes the Council and its affiliated unions as the collective bargaining agency for all its employees.
3. The Company agrees that it will employ only members of the unions affiliated with the Council and will let contracts or sub-contracts only to individuals or companies whose employees are members in good standing in the unions affiliated with the Council and will do all things necessary to insure that only members of the unions affiliated with the Council are employed in construction work in which the Company is engaged.
4. The Council through its affiliated unions will supply competent workmen to do the work of any trade or calling that may be required by the Company in the trades represented by the Council.

WAGES, HOURS AND WORKING CONDITIONS

5. The Company agrees to recognize and be bound by the agreements existing between each of the unions affiliated with the Council and the Toronto Builders' Exchange and specifically agrees that the provisions relating to wages, hours and working conditions set forth in the said agreements shall be binding on the Company. In the event any of the said conditions of any of the said agreements are altered or amended at any time during the currency of this agreement, the Company shall be bound by such alterations and amendments. The said agreements are available for inspection by the Company at the office of the Council at 67 Harbord Street; at the Toronto Builders'

Exchange, 1104 Bay Street, Toronto; and at the Department of Labour, Parliament Buildings, Toronto. The Council shall notify the Company of any amendments or alterations of the said agreements.

TERMINATION

6. This agreement shall remain in force for a period of one year from the date hereof and shall continue in force from year to year thereafter unless in any year not less than sixty days before the date of its termination, either party shall furnish the other with notice of termination of, or proposed revision of, this agreement; PROVIDED, however, that this agreement shall remain in full force and effect until completion of all jobs that have been commenced during the operation of this agreement.

IN WITNESS THEREOF the parties hereto have caused this agreement to be executed by their duly authorized representatives.

Signed on behalf
of the Company

Signed on behalf
of the Council

"M. J. Guthrie"

"Albert Hull"

(Seal)

"James J. Black"

10. It was agreed that Guthrie was incorporated on April 30, 1958, and on March 2, 1960, Mr. Guthrie registered the name Rosedale Construction ("Rosedale") as the name under which he would and did carry on business in his personal capacity. There are no formally signed collective agreements between Guthrie, Mr. Guthrie or Rosedale and any trade union.

11. Malcolm Guthrie testified that he read and signed the working agreement on March 10, 1960, and believes he signed it at Council's offices on Harbord Street in Toronto. Mr. Guthrie informed the Board that he attended at the Council's offices to sign an agreement so that Guthrie could operate on union jobs. He understood his employees would have to be unionized. The agreement was signed in front of Albert Hull and nothing much was said on that occasion. No one indicated any level of support in the trade unions and there was no discussion of whether Guthrie's employees were members of any of the affiliated members of the Council. In 1960, Guthrie had been in business with employees for two to three years. Prior to signing the agreement, Guthrie was for the most part engaged in small renovation jobs on houses. None of these jobs were union jobs and Guthrie employed carpenters and labourers and subcontracted painting and plumbing work. Mr. Guthrie was unable to remember whether any of his employees who were carpenters and labourers joined a carpenter's trade union or a labourer's trade union.

12. After the agreement was signed, Mr. Guthrie made sure, in accordance with his understanding, that union subcontractors were used by Guthrie. In cross-examination, Mr. Guthrie agreed that Guthrie is still operating and is still employing members of the Council's trade unions. In further cross-examination, Mr. Guthrie agreed that he went voluntarily to the offices of the Council to sign the agreement. While he did not recall what he said to Mr.

Hull, Mr. Guthrie did recall that there were no promises or threats made to or against him and that he left Mr. Hull on good terms.

13. There is no dispute that the working agreement was entered into on a voluntary basis at the desire of Mr. Guthrie. He sought out the representatives of the Council and signed the working agreement with the anticipation that certain benefits would enure to Guthrie and Guthrie apparently lived up to the intent of the working agreement. The present differences between the parties arise from the duties and obligations which result from the signing of the working agreement. The precise nature of the working agreement has never been analyzed by the Board, even though working agreements of the Council have appeared in various forms for more than a quarter of a century. Working agreements have become very much a part of the unionized portion of the construction industry in the Toronto area and have been regarded as peace treaties and instruments for harmony in the construction industry. However, regardless of these characterizations, the working agreement has traditionally been used, as in the instant case, as an entry into unionized construction work and as a method for an employer to stay on side from the point of view of the craft trade unions in the construction industry. The instant referral is similar to the facts in *Nicholls-Radtke*, *infra*, in that there was an agreement to supply employees to Guthrie as and when required. Moreover, and it cannot be emphasized too strongly, there was no evidence that the original employees of Guthrie were not members of the affiliates of the Council.

14. As was stated earlier, the Board has never analyzed the precise nature of the working agreement. However, it is clear that the Board has previously regarded the working agreement as giving rise to bargaining rights, see, for example, a grievance filed by the Council under section 112a [now section 124] with respect to *Napev Construction Limited and Vepan Leaseholds Limited* in Board File No. 0945-75-M. That decision, however, did not state why the working agreement was a collective agreement. In other decisions, such as *Napev Construction Limited*, unreported decision in File No. 1179-79-R, dated January 15, 1980, the Board was not prepared to find that the Labourers' International Union of North America, Local 183 held bargaining rights for employees of Napev Construction Limited under a working agreement and proceeded to issue a certificate to the trade union. In that decision, neither party was prepared to address argument on the issue of any outstanding bargaining rights. More recently, in *M. J. Guthrie Construction Limited, Rosedale Construction*, [1982] OLRB Rep. Sept. 1332, the Board dismissed a grievance which alleged a violation of the working agreement on the grounds that on the project in question the working agreement could not have had any force or effect either as a collective agreement or as some other type of enforceable arrangement.

15. The instant grievance places the characterization of the working agreement before the Board and it is necessary for the Board in order to make a determination on the grievance to analyze and characterize the working agreement before it.

16. The working agreement is a brief document which names the parties and states its purpose as the establishment of mutually satisfactory relations between Guthrie and its employees and satisfactory working conditions, hours of work and wages. In the recognition portion, Guthrie recognizes the Council and its affiliated unions as the collective bargaining agency for all of its employees. Guthrie has also agreed to employ only members affiliated with the Council and to subcontract only to individuals or companies whose employees are members in good standing in the unions affiliated with the Council and to do all things necessary to

ensure that only members of the unions affiliated with the Council are employed in construction work in which Guthrie is engaged. The Council has agreed through its affiliated unions to supply competent workmen to do the work of any trade or calling that may be required by Guthrie in the trades represented by the Council. Guthrie has also agreed to recognize and be bound by the agreements existing between each of the unions affiliated with the Council and the Toronto Builders' Exchange and has specifically agreed that the provisions relating to wages, hours and working conditions set forth in these agreements are binding on it. Guthrie has also agreed to be bound by any alterations and amendments to these agreements and the Council has agreed to notify Guthrie of such alterations or amendments. Finally, the working agreement is said to remain in effect for one year and to continue in effect from year to year subject to notice.

17. The working agreement clearly addresses itself to labour relations and may be either a collective agreement or a voluntary recognition agreement or neither of these agreements. The definitions in the *Labour Relations Act* are of assistance in characterizing the working agreement. Section 1(1)(e) refers to a collective agreement and states:

1.-(1) In this Act,

• • • •

(e) "collective agreement" means an agreement in writing between an employer or an employers' organization, on the one hand, and a trade union that, or a council of trade unions that, represents employees of the employer or employees of members of the employers' organization, on the other hand, containing provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, the employers' organization, the trade union or the employees, and includes a provincial agreement.

Section 16(3) refers to a recognition agreement and to its place in the scheme of collective bargaining. A recognition agreement is an agreement in writing signed by the parties, whereby an employer recognizes a trade union as the exclusive bargaining agent of the employees in a defined bargaining unit.

18. There is no dispute that Guthrie is an employer. Is the Council a trade union or a council of trade unions as defined in section 1(1)(p) of the Act which may enter into either a collective agreement as defined in section 1(1)(e) or a recognition agreement in its own name? Section 1(1)(p) states:

"trade union" means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national, or international trade union, a certified council of trade unions and a designated or certified employee bargaining agency.

There was nothing before the Board which indicated that the Council is an organization of employees as opposed to an organization of trade unions. Similarly, there was no suggestion

that the Council has ever been a certified council of trade unions. The first part of the definition in section 1(1)(p) refers to a trade union as an "organization of employees" and would include all organizations which would qualify as trade unions at common law. In addition, section 1(1)(p) proceeds to include in the definition of trade union creations of the Act, namely, a certified council of trade unions and a designated or certified employee bargaining agency. The latter has no relevance to this referral. With respect to a council of trade unions, however, section 1(1)(g) provides:

council of trade unions" includes an allied council, a trades council, a joint board and any other association of trade unions.

Since the Council is apparently an aggregation of trade unions rather than an association of employees, the Council does not qualify as a trade union at common law. However, under the *Labour Relations Act* certain councils of trade unions, called certified councils of trade unions, have been given the ability to acquire bargaining rights and to enter into collective agreements with employers. Section 1(1)(d) defines a "certified council of trade unions" and states as follows:

"certified council of trade unions" means a council of trade unions that is certified under this Act as the bargaining agent for a bargaining unit of employees of an employer.

Having regard to the fact that the Council is neither a trade union as defined in section 1(1)(p) nor a certified council of trade unions as defined in section 1(1)(d), the Board concludes that the Council may not enter into either a collective agreement nor a voluntary recognition agreement in its own name. It appears that the Council has not been structured to represent employees, rather it appears to be structured to represent trade unions.

19. In *The Board of Education of the City of Toronto*, [1982] OLRB Rep. March 496, the Board at page 506 commented on the role of an uncertified council of trade unions as follows:

21. It was agreed that the Council is not a certified council of trade unions as defined in section 1(1)(d). The Act contemplates that the role of an uncertified council of trade unions is to act as an agent of the trade unions which it represents rather than as an independent participant and bargaining agent. The decision of the Board in *Bathe & McLellan Const. Ltd.*, [1969] OLRB Rep. Jan. p.1041, held that "trade union" does not include an uncertified council of trade unions. It follows that the Council may neither hold nor exercise bargaining rights in its own name. However, the Council may act as an agent of other trade unions which possess bargaining rights....

The Council in the instant referral has purported to enter into mutual obligations with Guthrie in the working agreement as an agent for or representative of its affiliated unions. There can be no dispute that the affiliated unions are able to enter into collective agreements and recognition agreements on their own behalf. The working agreement in this referral refers to

“agreement” in two senses. Firstly, one meaning is clearly a reference to the document entitled “working agreement”. Secondly, the working agreement refers to “the agreements existing between each of the unions affiliated with the Council” and also refers to the alterations and amendments to such agreements. There may be only one collective agreement at a time between a trade union and an employer by virtue of the provisions of section 49 of the Act. Since there are far more detailed agreements for each affiliated union in existence than the working agreement, it is more logical to interpret this working agreement as a recognition agreement signed by the Council on behalf of its affiliates which simultaneously applies the collective agreements of the affiliates to the activities of Guthrie to the extent they may apply. While the recognition agreement does not specifically refer to a defined bargaining unit, the terms of the working agreement incorporate by reference readily ascertainable defined bargaining units in the various and appropriate collective agreements. While the Council may not enter into a recognition agreement on its own behalf, it has done so on behalf of the affiliates of the Council. The Council in effect has constructively, through one document, entered into a series of recognition agreements between its affiliates and Guthrie.

20. The next question to be addressed is whether in fact the affiliated trade unions have any bargaining rights with respect to any of the respondents’ employees and whether the respondents are bound by any collective agreement applicable to the project to which any of the applicants are a party. The respondents placed great stress on the fact that at the time the working agreement was entered into, Guthrie already employed employees and that neither the Council nor its affiliates represented any such employees at that time. It is of course not surprising that neither the Council nor the affiliates represented Guthrie’s employees at the time the working agreement was entered into. Surely the whole purpose of executing the working agreement was to gain representation or bargaining rights. If the respondents are referring to membership by employees rather than representation, the evidence of Mr. Guthrie is that there was neither discussion nor indication of level of support or membership by the employees. There is no evidence before the Board on this point and after twenty years this is not surprising. The respondents also pointed out that all except one of the applicant trade unions have never had any of their members employed by the respondent.

21. The respondents have raised issues concerning the effect of endeavouring to acquire bargaining rights before employees are actually employed by and working for an employer. In 1972, the Board stated on this point in *Sunrise Paving and Construction Co. Ltd.* 72 CLLC ¶16,060, at page 795, paragraphs 15 and 16 as follows:

It is readily apparent that the alleged collective bargaining relationship between the Respondent and the intervener arose as a result of an arrangement between them without reference to or consultation with the employees who would be affected by this arrangement. Clearly, the Respondent selected the intervener as the bargaining agent for its future employees. Such an arrangement strikes at the very spirit of the *Labour Relations Act* which envisages the selection of a bargaining agent by the employees concerned without the intervention or influence of their employer.

Employees of the Respondent did not have an opportunity to select their bargaining agent. The Board finds that the actions of the Respondent in all of the circumstances of this application constitute other support to a

trade union (intervener) within the meaning of section 40(a) [now section 48(a)] of the *Labour Relations Act*.

In *Sunrise, supra*, the Board held that by virtue of the provisions of section 40(a) [now section 48(a)], the collective agreements between the employer and an intervening trade union were not deemed to be collective agreements and accordingly not a bar to an application for certification. This decision was followed in *C. Strauss (1973) Limited*, [1975] OLRB Rep. July 581 and in *Volens Contractors Limited* (unreported decision in Board File No. 0802-75-R dated November 17, 1975).

22. Since those decisions, however, the Board has issued its decision in *Nicholls-Radtke and Associates Limited*, [1982] OLRB Rep. July 1028. In that case an employer signed an agreement with a trade union which incorporated the terms of a collective agreement between an employers' association at the time the agreement was entered into. However, the agreement was entered into on the understanding that the trade union would supply men to the employer's project. These men were supplied on the next day. In these circumstances, the Board held that the employer had not provided the trade union with "other support" and upheld the validity of the collective agreement. In discussing the earlier decisions of the Board, the Board stated in *Nicholls-Radtke* at pages 1032-1037:

9. In view of the arguments put forward by the applicant and the intervener, the present case comes down to a very basic policy choice for this Board. Should the Board continue to follow the policy set out in the *C. Strauss* case, that the mere signing of a collective agreement, when there are no employees in the bargaining agent, of itself constitutes employer support for a trade union? The agreed Statement of Facts signed by the parties in this matter indicates in paragraph three that the agreement was signed on the understanding that Local 2693 would supply workers if and when requested to do so by the respondent to the project which would be commenced at a later date. In making such an agreement, the intervener was merely acting as a lot of construction trade unions do in attempting to obtain work for its members. In this regard, reference should be had to section 46 of the Act which deals with certain permitted provisions of the collective agreements, in particular union security provisions.

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It is of course obvious that section 46(4)(d) used the exact same language as clause 1(1)(f), the definition of construction industry in the Act. Taken together, subsection 1 and subsection 4 of section 46 can be said to contemplate as permissive, provisions in a construction industry collective agreement requiring as a condition of employment membership in the trade union. And further, the structure of subsection 4 seems to indicate that, in the construction industry, compulsory membership or a preferential hiring clause may be inserted into a first collective agreement signed when voluntary recognition creates the bargaining rights which the union holds. If the Act contemplates as permissive conditions in construction collective agreements, preference of employment for union

members extending to membership in a trade union as pre-condition of employment, are we to find that the signing of such an agreement in the absence of any other factor is to be interpreted as support for the trade union within the meaning of section 48(a)? In the *Sunrise Paving* case, for instance, there was evidence upon which such a conclusion could be drawn. That is, the employer on hiring employees did the membership recruiting for the union. However, in the *C. Strauss* case, and in the present case, no such implication arises.

10. Both the Supreme Court of Canada in *Re International Longshoremen's Association, Local 273 et al. v. Maritime Employers' Association et al.* (1978), 89 D.L.R. (3d) 289, and the Ontario Court of Appeal in *Re Blouin Drywall Ltd.* (1975) 57 D.L.R. (3d) 199, have recognized that certain types of collective agreements, one in the longshoring industry, the second in the construction industry, cause problems with the word "employees" in that persons with no direct employment relationship may be employees because they are members of the union. In the *Blouin Drywall Ltd.* case, *supra* Brook J. A. commented as follows:

"While ss. 37(9) [now section 45(9)] and 42 [now section 50] of the Labour Relations Act do not extend the binding effect of a collective agreement or arbitration award made pursuant thereto beyond 'employees', I do not regard these sanctions as prohibiting the negotiating parties from agreeing to confer rights or benefits on non-employee members of the union and that such rights and benefits may then be the subject of grievance procedure and within the jurisdiction of an arbitration board under the agreement. Collective agreements in this industry have developed to include benefits to non-employees who are union members. In this industry, there is no continuing employment and so collective agreements have developed to ensure a source of labour to the contractor, to provide for preference in the employment of trade union members and, while establishing the terms and conditions of such employment, to provide other benefits which may become due or payable at a time when the union member is not employed.

Relevant to this case is the fact that s. 38(1)(a) [now section 46(1)(a)] of the statute contemplates the employer's covenant to give preference in hiring the union members. That section says:

'38(1) Notwithstanding anything in this Act, but subject to subsection 4, the parties to a collective agreement may include in its provisions,

- (a) for requiring, as a condition of employment, membership in the trade union that is a party to or is bound by the agreement or granting a preference of employment to members of the trade union, or requiring the payment of dues or contributions to the trade union;'

No doubt the provision contemplated by the statute is, indeed, union security; but equally certain in my view is that it anticipates a covenant in favour of those who are union members, unemployed and available and qualified to do the work, which covenant should be enforced in their favour. The Divisional Court held that as a primary purpose the clause was union security, the union could not claim on behalf of non-employee union members. With deference, in my view one cannot sever this clause into primary and secondary purposes and give it any effect at all. The enforcement of the preferential hiring of unemployed union members is the crux of the union security. The employment of its members is an assurance of union strength as loss of economic strength of the members collectively can only result in the loss of union strength.”

Indeed, as counsel for the intervener points out, there was nothing sinister in the making of the agreement referred to in paragraph three of the agreed Statement of Facts.

11. In the *Sunrise Paving* case, the Board commented that “the employees of the respondent did not have an opportunity to select their bargaining agent”. While in a case where the employer recruits employees who are subsequently forced to join the union, without a previous history of membership that may constitute support for the trade union. The simple fact is that in the construction industry, the unemployed members in a union’s hiring hall have in fact selected their bargaining agent as their union, and once they are referred to a job, that selection normally continues. As a consequence, one is faced with a rather difficult problem in interpreting how far the stated policy of the Board in the *C. Strauss* case should be carried. If an agreement is invalid because it was signed when there were no members in the bargaining unit, does the agreement become valid when, in the same circumstances it is signed after the employees have arrived at the job site? Thus, in the present case, would it really have made any difference concerning the wishes of employees if instead of signing the agreement on October 8, 1975, with an intention to supply at a later date, an agreement to supply had been made between the respondent and the intervener on the 16th of October, when there were two members of the intervener union employed in the bargaining unit? To say that the document is valid then, but not valid if signed on the 8th, in completely similar circumstances, is to propose a distinction without a difference.

12. On the other hand, it may be argued that the *C. Strauss* case, simply recognizes a limitation on the acquisition of bargaining rights that is implicit in the Act, namely, there must be employees in the employ of the employer at the time bargaining rights are acquired. Obviously, this is so in the case of certification, but also in the case of voluntary recognition. In this regard this latent policy in the Labour Relations Act is implicit in section 121 of the Act which reads as follows:

“An Agreement in writing between an employer or employers’ organization, on the one hand, and a trade union that has been certified as bargaining agent for a unit of employees of the employer, or a trade union or council of trade unions that is entitled to require the employer or the employers’ organization to bargain with it for the renewal, with or without modifications, of the agreement then in operation or for the making of a new agreement, on the other hand, shall be deemed to be a collective agreement notwithstanding that there were no employees in the bargaining unit or units affected at the time the agreement was entered into.”

That provision primarily recognizes that special circumstances are required for the construction industry due to the cyclical nature of employment in the construction industry. There may be times when an employer has no employees, but nevertheless as a matter of the on-going labour relations in the construction industry, the employer is bound by the results of collective bargaining. It would appear that such a provision which deems a collective agreement to be valid when there are no employees in the bargaining unit would only be necessary if in fact there was a problem with the validity of collective agreements signed when there are no employees in the bargaining unit.

13. It is our view, however, that when the document in the present case was signed on October 8th, 1975, the respondent and the intervener were performing two distinct, but related acts at the same time. The respondent employer was voluntarily recognizing the intervener union as the exclusive bargaining agent for employees in the bargaining unit, and contemporaneously agreed to certain terms and conditions of employment for those employees who would be affected by the recognition agreement. There would have been no arguable issue in this case as to the validity of the collective agreement if the respondent employer had signed it *after* the union’s members had reported for work. For this Board to hold that, in the circumstances of this case, where no other persons were working or had worked for the employer in the bargaining unit, *and* no other trade union held bargaining rights in respect of that bargaining unit, the agreement is not a valid collective agreement would have us place a premium on a strict, and technical interpretation of the Act, rather than giving the statute a practical and purposive one, particularly having regard to the common and sensible methods used by employers and trade unions in the construction industry to create bargaining rights without resorting to the certification procedures under the Act.

14. The respondent employer required persons to do the union represents. Section 121 of the Act indicates that an agreement in writing which is signed by persons. In the same way that the Courts in the *Blouin Drywall* and *Maritime Employers Association* cases, *supra*, held that members of a trade union who are not actually working for a particular employer but are associated with the union’s hiring hall to seek work are employees, the members of the intervener trade union on whose behalf the collective

agreement was entered into are “employees” whom the union represents. Section 121 of the Act indicates that an agreement in writing which is signed when there are no employees in the bargaining unit is deemed to be a collective agreement if, for example, the union is renewing a collective agreement or making a new agreement after an earlier collective agreement had expired, thus implying that an agreement signed after voluntary recognition when there are no employees in the unit may not be a collective agreement. The Board notes that section 121 of the Act merely deems an agreement in writing to be a collective agreement under certain circumstances; it does not provide that an agreement signed when there are no employees in the unit is not a collective agreement. (See section 48 of the Act for a specific provision deeming an agreement not to be a collective agreement). Therefore, section 121 of the Act has no application to the facts of this case.

15. The Board in *C. Strauss and Volens* held that there was no collective agreement by applying section 40 [now 48] after finding that the union had received “other support” from the employer when it signed a collective agreement without employees in the bargaining unit. We are satisfied that, in the circumstances of this case, although the agreement was signed on October 8th, 1975, when, as the parties have stipulated, “The respondent had no employees in the purported bargaining unit...”, the intervener union did not receive “other support” from the employer. To the contrary, the employer needed persons to perform work, and the union, which had members available with the skills necessary to do that work, undertook to refer its members to the employer in exchange for receiving voluntary recognition from the employer as exclusive bargaining agent for those persons. In our view this arrangement in the circumstances presently before us is not “other support” from an employer which calls for the application of section 48 of the Act.

16. Counsel for the applicant suggested that the *C. Strauss* case, *supra* is a necessary Board policy if the Board is not to effectively exempt construction unions from the operations of section 60 of the Act. That section provides in subsection 1 for an application for termination during the first year of an agreement after voluntary recognition. We think rather that section 60 provides the sort of protection necessary to go along with a finding that a collective agreement signed in the circumstances of the present case is not the result of some agreement between employer and the trade union subverting the rights of employees as, for instance, in the *Sunrise Paving* case. The Board therefore finds that the intervener had a collective bargaining relationship with the respondent in October, 1975.

23. In applying the reasoning and distinctions made in *Nicholls-Radtke and Associates Limited*, *supra*, to the facts of this referral, the Board finds that the working agreement was signed on the understanding that the affiliates would supply competent workmen if and when requested to do so and that in the circumstances of the signing of the working agreement a valid recognition agreement was signed by the Council as an agent for its affiliates. As stated

earlier, the collective agreements of the affiliates which are incorporated by reference then become applicable to the work performed by the respondents.

24. The respondents have also argued that the working agreement does not have validity as a voluntary recognition agreement because a working agreement does not comply with the requirements of sections 5(3) and 144(4) of the Act. These sections provide:

5.-(3) Where an employer and a trade union agree that the employer recognizes the trade union as the exclusive bargaining agent of the employees in a defined bargaining unit and the agreement is in writing signed by the parties and the parties have not entered into a collective agreement and the Board has not made a declaration under section 60, another trade union may, subject to section 61, apply to the Board for certification as bargaining agent of any of the employees in the bargaining unit defined in the recognition agreement only after the expiration of one year from the date that the recognition agreement was entered into.

144.-(4) A voluntary recognition agreement in so far as it relates to the industrial, commercial and institutional sector of the construction industry shall be between an employer on the one hand and either,

- (a) an employee bargaining agency;
- (b) one or more affiliated bargaining agents represented by an employee bargaining agency; or
- (c) a council of trade unions on behalf of one or more affiliated bargaining agents affiliated with the council of trade unions,

on the other hand, and shall be deemed to be on behalf of all the affiliated bargaining agents of the employee bargaining agency and the defined bargaining unit in the agreement shall include those employees who would be bound by a provincial agreement.

The respondents argue that the working agreement was not made by an employee bargaining agency, one or more affiliated bargaining agents represented by an employee bargaining agency, or a council of trade unions on behalf of one or more affiliated bargaining agents affiliated with the Council and does not contain a "defined bargaining unit". The working agreement was entered into many years prior to the enactment of section 144(4). However, the working agreement, as the Board has found, has been entered into by a council of trade unions as an agent of and on behalf of its affiliates who are affiliated bargaining agents with the Council. As the Board stated earlier, the "defined bargaining unit" is incorporated by reference into the working agreement. The purpose of the provisions of sections 144(4) and 5(3) is to define and limit the employees who may be covered by a recognition agreement. The working agreement by its own terms and by incorporation by reference satisfied this purpose.

25. The parties have argued the effect of accreditation orders on the bargaining rights attributed to Guthrie. The decisions of the Board establish that Guthrie is included in and bound by five accreditation orders of the Board. One of these accreditation orders is with

respect to bargaining rights held by the Labourers' International Union of North America, Local 506 ("Local 506") and Labourers International Union of North America Provincial District Council. Local 506 is one of the applicants in this referral. In various decisions with respect to accreditation, the Board has accepted the working agreement as evidence of a recognition agreement. See, for example, *The General Contractors' Section of the Toronto Construction Association* (Board File No. 1322-71-R, unreported decision of the Board dated April 18, 1973). In argument, the respondents challenged the jurisdiction of the Board to include Guthrie in an accreditation order. The position of Guthrie with respect to the accreditation certificate is beyond the terms of the referral in the matter. If Guthrie desires to challenge an accreditation order it may do so in a request for reconsideration to that proceeding. In this regard, the Board refers to *Ontario Precast Concrete Manufacturers' Association*, [1978] OLRB Rep. March 284, where the Board considered and dismissed a request to reconsider a certificate of accreditation.

26. After initially abiding by the intent of the working agreement, the respondents now seek to deny the existence of bargaining rights based on that working agreement which was entered into freely at the behest of Guthrie. Guthrie has challenged the efficacy of the working agreement more than twenty years after it was freely executed without any evidence regarding membership in trade unions by its employees at that time. Having, presumably, reaped benefits from the working agreement in 1960 and subsequently having been included in accreditation certificates, Guthrie is belatedly seeking to repudiate and avoid the effects of collective bargaining relationships which arose as a result of its own initiative. The Board has found that the working agreement is a recognition agreement entered into by the Council as the agent for the affiliated trade unions and that by virtue of incorporation by reference the collective agreements of the affiliated trade unions are to be applied having regard to the trade and type of work being performed. The Registrar is directed to list this reference for continuation of hearing on all outstanding issues.

2147-83-R Service Employees Union, Local 204, Affiliated with S.E.I.U., A.F. of L., C.I.O., C.L.C., Applicant, v. **Nucleus Housing Inc.**, Respondent

Employee – Employer – Attendants employed to care for quadriplegics in their own apartments – Funding provided by government through non-profit organization – Non-profit organization employer of attendants – Attendants not domestics employed in private homes – Not excluded from Act

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members I. M. Stamp and C. A. Ballentine.

APPEARANCES: *Allen Ferens and Joe Aggimenti for the applicant; A. Michael Stein and Bobbie Blackhall for the respondent.*

DECISION OF THE BOARD; January 16, 1984

1. This is an application for certification.

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3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

4. The applicant has applied to be certified as the exclusive bargaining agent for all employees of the respondent Nucleus Housing Inc. (“Nucleus”) in Metropolitan Toronto, excluding certain classifications not relevant here. The reply filed by Nucleus asserts that there is no appropriate bargaining unit of employees. The lists of employees which it filed in compliance with the Board’s direction as being employees coming within the bargaining unit described in the application includes persons all but one of whom are given the occupational classification of attendant. The single exception is a person who is given the occupational classification of housekeeper. For ease of reference hereafter, the Board will refer to the employees as attendants.

5. Counsel for Nucleus took the position at the hearing that there was no appropriate bargaining unit because the persons whom the applicant was seeking to represent are domestics employed in private homes and, by virtue of clause *a* of section 2 of the *Labour Relations Act*, excluded from it. In that respect the Act states that:

2. This Act does not apply,

(a) to a domestic employed in a private home.

The Board reserved its decision after hearing the representations of the parties on the issue. The Board then proceeded to hear the application on its merits on the basis that it would determine the application upon its merits only if resolution of the threshold issue failed to dispose of the application.

6. The facts asserted by counsel for Nucleus in his representations to the Board may be summarized as follows:

- (1) Nucleus is a non-profit corporation. It leases from the Metropolitan Toronto Housing Authority 14 individual apartments in a single, multi-floor building comprised of 252 units. Each of the 14 apartments is located on a different floor and is sublet by Nucleus to a male quadriplegic. The apartment tenant in each case pays his rent to Nucleus which in turn pays the housing authority.
- (2) Nucleus receives funds in the form of grants from the Ontario Government. These funds are used to provide each of the 14 apartment tenants with 24 hour personal attendant care. The tenants refer to the attendants as their “arms and legs” because they perform or assist the tenants in performing all of the ordinary, daily things that a person with full use of his limbs usually performs for himself.
- (3) Not all of the tenants require an attendant for 24 hours each day. Therefore, the tenants tell Nucleus the number of hours for each day in the week during which they will require the services of a personal

attendant. The attendants are scheduled to the tenants on the basis of those stated needs. The attendant assigned to a tenant on a particular day takes instruction from him as to the tenant's needs. The tenant does not necessarily have the same attendant each day and it may be inferred from the representations that some tenants will require personal attendant care over a period of time each day that would make it necessary for them to have more than one attendant in the course of a day.

(4) Nucleus was formed when one of its present tenants obtained leave to live outside of the special nursing home where it had been necessary for him to live up to that time. He was joined by a dozen more male quadriplegics. They were able to obtain grants from the provincial government for the purpose of providing them with personal attendant care. One of the conditions for obtaining those grants was that they be made to a corporation and not to the persons individually. Nucleus is run by a Board of Directors, 14 in number, 6 of whom are tenants in the 14 apartments leased from the housing authority through Nucleus.

(5) The Board was told also that one of the conditions under which the housing authority supplied the apartment units was that the authority would deal with the tenants only through Nucleus. That is why Nucleus receives rental payments from the 14 tenants and submits them to the housing authority.

7. Nucleus submits that the attendants are employed jointly by each of the 14 tenants. Counsel for Nucleus admits that it is arguable that Nucleus is the employer of the attendants and provides personal attendant care to the tenants, but he claims the attendants are, in reality, employees of the tenants in their homes for each day on which they are assigned to a tenant. During the term of his daily assignment, each attendant is the personal domestic servant of the tenant performing all of the services commonly associated with that function in the course of being the "arms and legs" for the tenant. Although it may be a different person each day who performs these functions, they are persons who are providing a domestic service in a private home. Counsel emphasizes that this set up is wholly distinguishable from a nursing home or chronic care home. Each tenant who uses the domestic services of the attendants is an individual tenant living in his own distinct apartment unit. While all 14 tenants live in a common building, they could just as well be living in any housing accommodation and hiring directly their own personal attendants. The only reasons it is not that way, according to counsel, is because the provincial government has not been prepared to fund each person individually. Therefore, in order to gain independence from institutional living, they have had to create Nucleus as the enabling agency for channeling the available funding to each of the 14 persons. Counsel asserts that this is a facade and the Board must look beyond it and find that the tenants are the true employers of the attendants and that each attendant, by virtue of the nature of the service rendered to the tenants, is "... a domestic employed in a private home;".

8. There is no doubt that the 14 tenants, having come to terms with their individual disabilities, would prefer to live as independant lives as is possible in their circumstances. To this end, it is understandable that they would prefer to be dealt with as individuals when it

comes to receiving the funding essential to the provision of the personal attendant care which they must have in order to live outside of institutions. It is quite apparent from the representations to the Board that these young men, several of whom were in attendance at the hearing, have made Herculean efforts in order to gain as much independence as they presently have. Nonetheless, as much as they might wish it to be otherwise, funding is available to them only through Nucleus. That is the reality of the situation which is before this Board.

9. While counsel for Nucleus submits that each tenant is the master of the person or persons assigned to him as his daily personal attendant in terms of directing what services the attendant is to perform for him, all of the other elements characteristic of an employee-employer relationship are clearly within the control of Nucleus. In these circumstances, the Board finds that Nucleus is the employer of the persons whom the applicant is seeking to represent. Consequently, they are not domestics employed in private homes within the meaning of section 2(a) of the Act.

10. The parties were agreed, should the Board find that the persons affected by this application were employees under the Act and employed by Nucleus, that the bargaining unit proposed by the applicant in its application was an appropriate one. Having regard to their agreement, the Board finds that all employees of the respondent in Metropolitan Toronto, Ontario, save and except supervisors, persons above the rank of supervisor and office staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

11. The Board is satisfied, on the basis of all of the evidence before it, that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on December 22, 1983, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

12. A certificate will issue to the applicant.

2126-83-M Local Union 2965, Resilient Floorworkers, U.B.C.J.A., Applicant, v. Perfection Rug Co. Ltd., Respondent

Arbitration – Construction Industry Grievance – Practice and Procedure – Grievance alleging non-compliance with oral settlement of prior grievance – Whether non-compliance constituting breach of collective agreement – Whether arbitrable under s.124 – Oral settlement reached in absence of LRO after LRO appointed – Whether enforceable – Whether manager had authority to enter into settlement

BEFORE: R. D. Howe, Vice-Chairman, and Board Members F. S. Cooke and J. Wilson.

APPEARANCES: *Lewis Gottheil and Harry Hinton for the applicant; Mark E. Geiger, Ronald E. Thomson and Andre Houle for the respondent.*

DECISION OF THE BOARD; January 31, 1984

1. This is a referral of a grievance to the Board pursuant to section 124 of the *Labour Relations Act*, which provides in part as follows:

124.-(1) Notwithstanding the grievance and arbitration provisions in a collective agreement or deemed to be included in a collective agreement under section 44, a party to a collective agreement between an employer or employers' organization and a trade union or council of trade unions may refer a grievance concerning the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable, to the Board for final and binding determination.

(2) A referral under subsection (1) may be made in writing in the prescribed form by a party at any time after delivery of the written grievance to the of subsections 44(6), (8), (9), (10), (11) and (12) apply with necessary modifications to the Boareceipt of the referral and may appoint a labour relations officer to confer with the parties and endeavour to effect a settlement before the hearing.

(3) Upon a referral under subsection (1), the Board has exclusive jurisdiction to hear and determine the difference or allegation raised in the grievance referred to it, including any question as to whether the matter is arbitrable, and the provisions of subsections 44(6), (8), (9), (10), (11) and (12) apply with necessary modifications to the Board and to the enforcement of the decision of the Board.

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2. The grievance which has been referred to us in these proceedings is dated November 29, 1983 and was delivered to the respondent on or about December 2, 1983. It alleges

that the respondent has failed to fully comply with the terms of settlement of an earlier grievance dated October 17, 1983, and requests a declaration to that effect and an award of compensation "in the amount of two weeks pay as per the settlement with interest". In that earlier grievance, which was referred to the Board on October 18, 1983 (File No. 1622-83-M), the applicant alleged that the grievor Tony DiCarlo had been improperly laid off and unjustly discharged. How the present grievance came to be referred to the Board can perhaps best be appreciated in the light of the following passages from the December 12, 1983 decision of the Board, differently constituted, concerning the earlier grievance (which decision is now reported at [1983] OLRB Rep. Dec. 2061):

2. The application was made October 18th, 1983. On October 20th, the Board notified the parties in the customary form that a hearing would be held into the application on November 1st, 1983 and, in the interim, a Board Officer was named to confer with the parties and endeavour to settle the matter in dispute. The November 1st hearing was adjourned by consent of the parties and rescheduled for November 23rd. On November 21st, counsel for the applicant addressed a letter to counsel for the respondent with respect to that hearing which contained the following statement:

"... the union will be taking the position in this ... case that the Board no longer has jurisdiction to arbitrate the grievance on the merits because the grievance has been settled by the parties. The union will, accordingly, ask the Board to enforce the settlement ..."

The matter was raised at the hearing by applicant counsel as a preliminary issue going to the question of whether the Board had jurisdiction to hear the grievance. Accordingly, the Board heard the submissions of the parties on the preliminary issue.

3. The parties agreed that they were bound to the provisions of the Carpenter's Provincial Agreement and that the subject matter of the grievances arises thereunder. The grievance alleges that improper lay-off and unjust discharge of Tony DiCarlo from employment with the respondent. The position of the respondent put forward by its counsel at the hearing was that the matter had not been settled and the Board was properly seized with the grievance and had jurisdiction to hear it as filed. The applicant took the position stated in the letter; in other words, that the Board had no jurisdiction to hear the grievance on its merits because it had been settled. Notwithstanding the applicant's claim that the Board had no jurisdiction, however, the applicant wanted the Board to inquire into the fact of settlement and, if found, to issue a declaration and direction to the employer to comply with the terms of the settlement.

4. Respondent counsel argued that, where there is an issue of arbitrability, an arbitrator should decide only the question of whether there has been a settlement. If settlement has been achieved, the arbitrator has no jurisdiction to hear the grievance. Counsel pointed out that the respondent had not raised any question of arbitrability; on the contrary, it took the

position that the Board is properly seized with the grievance because the respondent has not raised any challenge to the Board's jurisdiction. The respondent disputed the existence of a settlement and through its counsel argued that the question of settlement is irrelevant because the respondent has not challenged the Board's jurisdiction to hear the grievance. Counsel contended that, had there been settlement as the applicant alleges, the applicant should withdraw its grievance. On the other hand, if the applicant is not prepared to withdraw its grievance, it should proceed to have it arbitrated on its merits. By not doing either, counsel contended, the applicant is trying to have the Board determine for it what the applicant should do. In counsel's view, the applicant had a clear choice; either withdraw the grievance or proceed with it on its merits.

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6. Applicant counsel argued that its request of the Board to hear evidence and representations on whether the grievance was settled simply raised the fundamental issue of the arbitrability of its grievance, a proper issue for an arbitrator to decide. According to counsel, proof of the alleged settlement goes to that question of arbitrability. He argued that the purpose of arbitrating disputes arising under a collective agreement is to make available to the disputing parties a speedy and effective resolution. If the parties settle prior to arbitration, either party should be able to make those settlements hold. Counsel argued that an arbitrator can achieve that objective, no matter which party has raised the issue of settlement, by determining whether settlement has been achieved in the course of deciding that fact as an issue going to the arbitrability of the grievance.

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8. The Board adjourned to consider the parties' submissions and the two arbitration awards on which each was relying. Having regard to those submissions and the principles expressed in the two awards, the Board refused the applicant's preliminary motion and advised applicant counsel that he could elect to pursue the original grievance before the Board on its merits or he could withdraw the grievance and file a new one, the subject matter of which would be the respondent's failure to comply with the settlement it is alleged to have made with respect to the original grievance. The applicant asked leave of the Board to withdraw the grievance herein and advised the Board that it would file a fresh grievance alleging that the respondent had failed to comply with the terms of the alleged settlement of that grievance. In these circumstances, the Board consented to the withdrawal of the grievance.

9. In view of the nature of the submissions and authorities relied on by the parties, the Board, prior to making its oral ruling did not have before it the decision of the Board, differently constituted, in *Suss Woodcraft Ltd.*, [1983] OLRB Rep. April 600. This is a decision in which the Board directed the employer to comply with an oral settlement of a grievance.

It is clear in that case that the Board was seized with the original grievance and there was no issue of the Board's jurisdiction in that respect. The applicant trade union prosecuted the original grievance and, in the course of establishing liability and quantum of damages for violation of the agreement, it relied on the evidence of the settlement it had reached with the employer. Therefore the Board in that case had before it the applicant's evidence of the employer's admission of liability for having violated the collective agreement, of their negotiations to resolve the matter and an oral settlement of the grievance.

10. The Board in *Suss* also had before it the awards of the arbitrators referred to in the decision, awards which were not before the Board in the instant case. It appears to have accepted the principle espoused in those awards that, where the settlement of a grievance is proven before the arbitrator, the arbitrator has jurisdiction to direct compliance, apparently in order to give effect to the final and binding resolution of the grievance referred.

11. The Board herein endorses the principle encompassed in the awards referred to the Board in *Suss*, *supra*, and by reference adopted by the Board. As well, this Board endorses the sound industrial relations purpose which is served by the Board's decision in *Suss* to direct compliance with the terms of the oral settlement; that is, the important purpose of supporting the settlement process at any stage of the grievance procedure. That purpose was recognized more than 30 years ago by the arbitrator in *Re Ford Motor Company* [(1952), 3 L.A.C. 1159 (Lang)]. The fact that the source of his jurisdiction in that case was a fresh grievance alleging failure by the employer to implement the terms of settlement made in an earlier grievance detracts not at all from the importance which he attached to supporting the settlement process. He made abundantly clear the importance of the settlement process in any voluntary procedure for the final and binding resolution of grievances. In the course of reviewing the specific provisions of the grievance procedure in the collective agreement before him, the arbitrator expressed the following comments about the potential consequences of the employer not being bound by settlements made at any step of the procedure:

If the Company be not bound by the decision of the foreman, which is satisfactory to the employee, then neither is it bound by the satisfactory decision of the Superintendent or Personnel Manager, and any settlement reached at any stage of the grievance procedure may be repudiated by the Company. And the Company would be bound only by the decision of an Umpire. Surely that cannot be either the intention of the parties or a correct interpretation of the meaning or legal effect of the Agreement. The purpose of grievance procedure is to effect a settlement of complaints of employees by peaceful means without recourse by the employees to strike action. If the company's argument be correct, then every grievance would necessarily have to

be taken to the fourth or Umpire stage, in order to bind the Company. This would reduce the grievance procedure to a farce. Moreover *since an appeal can only be lodged by the employee in the event that the decision of the foreman, superintendent or personnel manager be unsatisfactory, the Company could, by continually refusing to be bound by the satisfactory answers of its officials nullify the grievance procedure.*

[emphasis added]

In finding that the employer was bound by the specific language of the collective agreement, the arbitrator commented further as follows:

This decision is based solely on legal interpretation of the terms of the Agreement. But if it were decided only on the practical results of the case the conclusion would be unchanged because *I deem it much more important that grievances, once settled, in the course of grievance procedure, should be binding on both parties, even though a practical difficulty be occasionally created by an incorrect settlement, than that all grievances should be carried to an Umpire or grievance procedure be scrapped or discredited, because practical difficulties can always be solved by the conscientious cooperation of the Company and Union officials.*

[emphasis added]

12. Since, however, the Board's ruling in the instant case was made on the basis of the submissions and legal authorities placed before it at the time, the Board confirms its oral ruling and its consent for withdrawal of the grievance and the grievance is hereby withdrawn.

3. At the commencement of the hearing before the present panel of the Board on January 16, 1984, counsel for the respondent raised a preliminary objection concerning the Board's jurisdiction to hear and determine the instant grievance. It was his position that the Board has no jurisdiction under section 124 to deal with a grievance which alleges a violation of the terms of an alleged settlement. In support of that position he contended that a settlement of a dispute constitutes a separate contract between the parties. He also submitted that once a labour relations officer has been appointed by the Board pursuant to subsection 124(2), only written settlements signed by the parties and submitted to the Board for approval should be treated as binding settlements. Although it was common ground between the parties that no labour relations officer was present at the time the parties allegedly entered into a settlement of the previous grievance, counsel for the respondent submitted that if the Board heard evidence concerning the oral settlement alleged by the applicant in the present case, it would lead to evidentiary and procedural difficulties in future cases in which a labour relations officer was present at the time an oral settlement was allegedly entered into. It was also his position that the respondent had not entered into a binding settlement in the present case since the member of management who allegedly settled the previous grievance was acting beyond the

scope of his actual and apparent authority. Thus, it was the respondent's position that the applicant could only seek redress on behalf of Mr. DiCarlo by refiling the original grievance with the Board for determination on its merits.

4. Counsel for the applicant, on the other hand, submitted that the Board does have jurisdiction to hear and determine the present grievance. In support of his position he referred the Board to a number of authorities including the *Ford Motor Company* arbitration award, *supra*, *Suss Woodcraft Limited*, *supra*, and the Board's December 12, 1983 decision concerning the earlier grievance. He also submitted that the respondent's failure to comply with the terms of the (alleged) settlement constituted a violation of various provisions of the applicable collective agreement.

5. After hearing the submissions of the parties concerning the respondent's preliminary objections, we indicated that we would be reserving our decision concerning that matter and would proceed to hear the evidence and representations of the parties concerning the merits of the present grievance (without prejudice to the respondent's preliminary objection). That approach was adopted since it appeared likely that the evidence and argument concerning the alleged settlement could be completed that day, thereby avoiding any necessity of reattendance by the parties in the event that the respondent's preliminary objection failed.

6. Having carefully considered the submissions of counsel concerning the respondent's preliminary objection, we have concluded that it cannot succeed. Whether raised in the context of the original grievance (as in *Suss Woodcraft Ltd.*, *supra*) or of a second grievance (such as in the present case and in *Ford Motor Company*, *supra*), an allegation that a party to a collective agreement has failed to comply with the settlement of a grievance constitutes an arbitrable question concerning the "application" or "administration" of the collective agreement, within the meaning of subsection 124(1) of the Act. As noted by the Board in paragraph 11 of its December 12, 1983 decision in File No. 1622-83-M (quoted above), arbitrators have recognized and endorsed for over three decades the importance of supporting grievance settlement processes. In some cases that objective has been achieved by applying the doctrine of estoppel: see, for example, *Fruehauf Trailer Company of Canada* (1951), 3 L.A.C. 847 (Cross), and *Dominion Bridge Company Limited (Toronto)* (1951), 2 L.A.C. 741 (Fuller). Other arbitrators simply find settlements to have been entered into and exercise their remedial power so as to direct the parties to carry out the terms of the settlements: see, for example, *Re Bilt-Rite Upholstering Co. Ltd.*, (1979), 24 L.A.C. (2d) 428 (Rayner); *Re Continental Can Co. of Canada Ltd.* (1975), 10 L.A.C. (2d) 35 (Weatherill); *Ford Motor Company of Canada*, *supra*; *Suss Woodcraft Ltd.*, *supra*; and the authorities referred to therein.

7. The case of *Re Mason and Treasury Board (Post Office Department)* (1981), 3 L.A.C. (3d) 117 (P.S.S.R.B.), which was relied upon by the respondent in the proceedings before the Board panel which dealt with the previous grievance and in the proceedings before the present panel, does not assist the Board in determining the present case. In that decision the adjudicator (K. E. Norman) held that he had no jurisdiction under subsection 91(1)(a) of the *Public Service Staff Relations Act* to enforce or declare the existence of a settlement of a grievance. The material part of that statutory provision read as follows:

91(1) Where an employee has presented a grievance up to and including the final level in the grievance process with respect to

(a) the interpretation or application in respect of him of a provision of a collective agreement or an arbitral award ...

and his grievance has not been dealt with to his satisfaction, he may refer the grievance to adjudication.

The relatively narrow jurisdiction given to an adjudicator under that provision (which permits an individual employee to refer his or her grievance to arbitration) may be contrasted with this Board's broader jurisdiction under subsection 124(1) of the *Labour Relations Act* to make a final and binding determination with respect to grievances "concerning the interpretation, application, administration or alleged violation" of a collective agreement, including any question as to whether any matter is arbitrable.

8. As noted by counsel for the respondent, much of the existing arbitral jurisprudence concerning the enforceability of settlements has arisen in the context of settlements reached by parties during various steps of the grievance procedures specified in their collective agreements. However, notwithstanding counsel's able argument to the contrary, we are not persuaded that we should adopt a different approach in the context of section 124. In its recent decision (dated November 3, 1983) in *Ontario Hydro*, File Nos. 0708-82-M and 0709-82-M (reported at [1983] OLRB Rep. Nov. 1869), the Board, in considering the efficacy of an oral settlement between parties to section 124 applications, wrote as follows:

23. Nothing in the collective agreement, the *Labour Relations Act* or the common law requires that the terms of settlement of a grievance arising under a collective agreement be reduced to writing before that settlement can be enforced.

24. Although the settlement of a grievance need not be made or evidenced in writing, it very often is. That was certainly the experience of the trade union and employer witnesses in this matter. It is not hard to see why that would be so. A written memorandum evidencing the agreement of the parties greatly facilitates the proof of, and thereby reduces the potential for dispute over, the agreement's existence or terms.

25. Of course, not every written agreement is a mere memorandum evidencing the terms of an existing oral agreement. In complex matters, negotiations may proceed orally until the parties feel they have reached agreement in principle, leaving the details to be worked out thereafter in the process of drafting a written agreement. To the extent the anticipated written agreement is required or expected to contain terms or resolve points not finalized during oral negotiations, it can fairly be said that there is no agreement until the required document has been finalized and executed. Delivery and execution of the anticipated document is, in those circumstances, a pre-condition to the existence of a binding agreement. In each case where a written agreement is contemplated, it is "a question of construction, whether the parties intended that the terms agreed should merely be put into form, or whether they should be subject to a new agreement the terms of which are not expressed in detail." (*Winn v.*

Ball, (1877) 7 Ch. D. 29 per Jessel, M.R. at p. 32; see also *Re Dominion Stores Limited and United Trust Co. et al*, (1974) 42 D.L.R. (3d) 523 (Ont. H.C.) at pp. 527 to 529; aff'd 52 D.L.R. (3d) 327 (Ont. C.A.); aff'd 71 D.L.R. (3d) 72 (S.C.C.)).

26. The purpose of any grievance arbitration process is to secure prompt, final and binding settlement of disputes involving the application and interpretation of collective agreements, in the interest of industrial peace (see *Heustis v. New Brunswick Electric Power Commission*, [1975] 2 S.C.R. 768 per Dickson, J. at 781). The pre-arbitration grievance procedures typically provided for in collective agreements afford the parties an opportunity to resolve disputes promptly, informally and without the expense of arbitration. The requirement that such procedures be exhausted before proceeding to arbitration enhances the prospects of settlement. Section 124(2) serves a similar purpose by providing for the appointment of a Labour Relations Officer to endeavor to effect a settlement before the Board conducts a hearing. Our labour relations system relies on and values the ability to settle disputes. This Board is loath to adopt any approach which might limit or impair the settlement process or discourage its use: *Crown Electric*, [1978] OLRB Rep. Apr. 344; *Bot Construction (Canada) Limited*, [1982] OLRB Rep. Dec. 1811. It is important that boards of arbitration not impose unnecessary technicalities or limitations on the settlement process, because to do so would undermine the finality of settlements parties feel they have achieved in good faith. (See *Ford Motor Company of Canada Ltd.*, (1952) 3 L.A.C. 1159 (Lang) at 1161; *City of Sudbury*, (1965) 15 L.A.C. 403 (Reville); *Re Continental Can Co. of Canada Ltd.*, (1975) 10 L.A.C. 35 (Weatherill).)

27. The question of the efficacy of an oral settlement agreement arose in *Re Bilt-Rite Upholstering Co. Ltd.*, (1980) 24 L.A.C. (2d) 428 (Rayner). In that case an arbitration hearing had been adjourned pending settlement discussions. When the hearing resumed, company counsel took the position that the matter had been settled in the meantime. Union counsel took the position that the matter had not been settled. Both counsel agreed that their settlement discussions had reached a point at which they had reached oral agreement on the terms of a settlement which had been reflected in an executed handwritten draft agreement which both counsel had pronounced satisfactory. The handwritten draft had been typed up and the typed version circulated for execution. At that point, union counsel had learned of 430-431:

The Board is of the opinion that the parties reached settlement on all substantive matters. There were not matters left in dispute after the parties had reached their settlement. It is true that the settlement contemplated the reduction of the settlement to writing and signing by both parties. However, in our view, this was a mere procedural matter and was not an essential part of the settlement. If the union had suggested that there was [sic] some substantive terms that had not

been covered by the settlement, the matter would be quite different. No suggestion was forthcoming.

The Board is also of the opinion that the analogy that union counsel attempted to draw between the settlement and the requirement that a collective agreement be in writing is not persuasive. There is no doubt that the grievor approved the settlement at the conclusion of the hearing. Thence was ratification, if such was necessary at that time. Obviously, a collective agreement is far different in scope and impact from minutes of settlement. In the first place, the collective agreement covers a multitude of employees and is drawn to cover many possible future situations and potential areas of conflict. A collective agreement must also be ratified by members of the bargaining unit. All of these reasons indicate the purpose behind the provisions of the *Ontario Labour Relations Act*, R.S.O. 1970, c. 232, which require an agreement to be in writing. These reasons do not pertain to a settlement.

Moreover, one cannot conclude that the settlement should be vitiated simply because of some potential impending legislation that may or may not be enacted and may or may not be retroactive.

In essence, the parties reached agreement on all terms and should be held to that agreement.

Accordingly, the board concluded that the parties reached agreement and the grievance is no longer arbitrable.

28. We come to the same conclusions in this case as did the board of arbitration in *Bilt-Rite*...

In the *Ontario Hydro* case, as in the present case, a labour relations officer appointed by the Board under subsection 124(2) of the Act had met with the representatives of the parties. However, a settlement was not entered into at that meeting but rather was alleged to have been entered into at a subsequent meeting at which the labour relations officer was not present.

9. In *Suss Woodcraft Ltd.*, [1983] OLRB Rep. April 600, the Board, after reviewing a number of arbitration awards, held that it had jurisdiction under section 124 to enforce an oral settlement of a grievance:

7. The Board in a section 124 referral is acting in the place of an arbitrator, and Mr. Nyman for the applicant has brought to the Board's attention considerable arbitral jurisprudence for his position that an arbitrator can order the implementation of a settlement reached under the collective agreement. In *The Corporation of the Town of Scarborough* (unreported), released May 23, 1978 (Brandt), the employer's Board of Control met with the union to discuss a grievance, and at the conclusion of the meeting passed a resolution upholding the grievance and awarding the grievor the transfer which he sought. At a subsequent meeting, the

matter was re-opened and the Board passed a resolution reversing its decision. The Board of Arbitration unanimously found that the initial action of the Board of Control constituted a decision which in effect resolved the grievance between the parties, and wrote at page 4 of its award:

“... for the purposes of the orderly and final resolution of disputes arising between the parties to a collective agreement a decision of [the employer] once reached must be treated as final and as one which the parties to the agreement can rely on as representing the disposition by the [employer] of an outstanding matter. Were it otherwise there would be no finality to the grievance procedure. This would not be conducive to the orderly administration of the collective agreement.

The consequence of settlement of a grievance in the grievance procedure is to render inarbitrable that grievance or any subsequent grievance which raises the same issue. In *Re City of Sudbury*, 1965 15 L.A.C. 403 (Reville) the following quotation from *Re Mueller Limited* 1961 12 L.A.C. 131 (Reville) was approved:

The grievance procedure is designed to provide members of the bargaining unit and the union with a method of orderly processing their respective grievances. In order to avoid the expense inherent in the arbitration process the procedure provides for bona fide efforts to be made by the grievor and management to settle the dispute at various stages and at various levels. It follows, therefore, that if the grievor and/or the Union actually or impliedly accepted the decision of management they should not be allowed to have second thoughts on the matter and re-process essentially the same grievance at a later date. If this were to be allowed, management would never know whether, in fact, its decision had been accepted by the individual grievor or the union representing him, and management would be plagued and harassed in what would be a plain abuse of the grievance procedure.

It may equally be said of this case that the Union must be in a position to know that decisions arrived at by management can be relied on as constituting a final disposition of a matter in dispute and not subject to re-opening at a later time.

The Board then concluded:

In the result the grievance is allowed and the Corporation is directed to implement the decision of the Board of Control.

8. In *Canadian International Paper Company* (unreported), released May 22, 1982 (Brunner), the arbitrator found as a fact that a grievance had been settled orally at a meeting between the company and the union. The

union witnesses, whom the arbitrator found to have a much better recollection of the meeting than the company witnesses, provided the following account:

“... The matter was then reviewed and reference was made by Connors to the fact that over one year’s back pay was at issue. Amounts of \$1,000 and \$1,500 were mentioned. Tinmouth suggested that the payroll records would have to be perused to ascertain the exact number of hours that were involved. To this Connors replied that he would be satisfied with whatever amount Tinmouth agreed was ‘sufficient to cover the damage’. Tinmouth then asked whether Batten and Bucking were the only employees with similar grievances. Connors after ‘looking around’ the room stated that they would be the only two grievors if ‘we can consider the matter resolved’. To this Tinmouth replied ‘you can consider the matter resolved and I will check the payroll cards’.

After reviewing the authorities in support of the proposition that evidence of settlement discussions is admissible and necessary to *prove that a settlement has been made*, the arbitrator concluded:

“I find that the terms of the settlement were that Batten and Bucking were to be paid at the level H hourly rate set forth on p. 28 of the Collective Agreement for each hour they had worked on or after April 1, 1979 as Lead Hands.”

and directed as follows:

“... the grievance must be allowed and a declaration that a settlement agreement in the terms already noted was entered into on July 4, 1980 is issued. The Company is directed to forthwith implement the settlement and pay Batten and Bucking for all hours worked by them as Lead Hands between April 1, 1979 and June 25, 1980, at the then prevailing level H hourly rate for the single Service division less whatever amounts they were paid at their scheduled occupational rates.”

• • •

10. In the present case, all aspects of the union’s claim are said to have been settled. The settlement was not in writing, but as the *Canadian International Paper Company case*, *supra*, shows, that is simply a matter of proof. Here there was no evidence called by the respondent to refute the sworn testimony of Mr. Cartwright, and the Board has no difficulty concluding that an oral settlement was reached for the payment of \$1,000 to the union.

11. The company is accordingly directed to pay the amount of \$1,000.00 to the union forthwith.

See also *Urban Mechanical Contracting 1979 Ltd.*, File No. 1293-83-M, decision dated November 22, 1983 (now reported at [1983] OLRB Rep. Nov. 1944), in which the Board found an oral settlement (entered into by counsel for the parties) to be binding, and exercised its powers under section 124 of the Act to direct the parties to comply with the terms of that settlement.

10. As indicated in *Ontario Hydro, supra*, nothing in the *Labour Relations Act*, the common law, or the pertinent arbitral jurisprudence requires that an oral settlement of a grievance arising under a collective agreement be reduced to writing before that settlement can be enforced (nor is there any such requirement contained in the collective agreement by which the parties to the present application are bound). Respondent's counsel submitted that enforcement of oral settlements entered into following the appointment of a labour relations officer under subsection 124(2) of the Act is undesirable because it would tend to create situations in which evidence of settlement discussions would have to be tendered before the Board, and in which parties might need the testimony of a labour relations officer to establish or refute an alleged settlement. However, we do not find that argument to be persuasive. As noted above, it was common ground between the parties that no labour relations officer was present at the meeting at which the applicant alleges that the parties entered into the oral settlement to which the instant grievance pertains. Thus, the admissibility of testimony by a labour relations officer concerning settlement discussions is not an issue. If the Board is directed to forthwith implement the settlement and pay Batten and Bucking for all hours workfare present, they will no doubt continue to encourage parties to enter into written settlements in order to facilitate proof of the existence and terms of such settlements, and to reduce the potential for disputes about such matters. If an issue arises concerning the existence or terms of a settlement where a party (or a representative of a party) orally settles a grievance in the presence of a labour relations officer but subsequently refuses to enter into a written settlement, the parties or their representatives would themselves be in a position to testify before the Board concerning the pertinent events. Thus, information from a labour relations officer would not necessarily be required to establish the existence or terms of such settlement. Should the Board be satisfied that such information was required in a particular case, sections 109 and 111(6) of the Act would appear to empower the Board to obtain such information.

11. The Board is committed to settlement activity as a highly desirable method of resolving labour relations disputes, including grievances referred to the Board under section 124. Thus, as indicated in *Ontario Hydro, supra*, as a matter of policy the Board is loath to adopt any approach which might limit or impair the settlement process or discourage its use, by imposing unnecessary technicalities or limitations, such as an absolute requirement of written settlements in the context of section 124. It has been the Board's experience that the vast majority of section 124 applications are resolved through settlements which obviate the need for a hearing. It is not unusual for such settlements to be entered into shortly before the hearing date (which, by virtue of subsection 124(2), must be not more than fourteen days after the Board's receipt of the referral). See, for example, *Urban Mechanical Contracting 1979 Ltd., supra*, in which settlement discussions carried on by counsel through telephone conversations culminated in an oral settlement at 9:30 p.m. on the eve of the hearing date. For the Board to impose a technical requirement of a written settlement in such circumstances would not, in our view, facilitate the settlement process or otherwise further harmonious relations within the construction industry labour relations community.

12. For the foregoing reasons, it is our conclusion that the Board does have jurisdiction

under section 124 of the Act to enforce an oral settlement of a grievance (entered into by parties to which section 124 applies). We are also satisfied that a failure by the respondent to comply with the monetary portion of a settlement of the type alleged by the applicant in the present case would constitute a breach of Article 21.17 of the applicable collective agreement, which provides:

Monetary settlements of a grievance involving employee(s) should be forwarded to the Local Union or District Council for distribution to the grievor(s).

Under the circumstances, it is unnecessary for the Board to determine whether such failure would also be arbitrable as a breach of Articles 6, 22, and 24, as contended by the applicant.

13. Accordingly, the respondent's preliminary objection concerning the Board's jurisdiction to hear and determine the present grievance is dismissed.

14. With respect to the merits of the present grievance, the Board heard the evidence of Harry Hinton, who is the applicant's Business Manager, and Andre Houle, the respondent's Installation Manager. Mr. Houle has occupied his present position with the respondent for approximately fifteen years. He exercises a number of managerial functions on behalf of the respondent, including hiring and laying off bargaining unit employees. Over the years he has orally settled a number of grievances through telephone conversations and meetings with Mr. Hinton. It appears from the evidence that he had authority to personally settle on behalf of the respondent each of those grievances with the exception of one grievance (the "Facelle" grievance) which involved a substantial monetary settlement (of approximately \$2,000). It was his evidence that he telephoned Ronald Thomson, the respondent's Toronto Branch Manager, to find out if he could settle the Facelle grievance for that amount. However, it is questionable whether Mr. Hinton was made aware that Mr. Houle needed Mr. Thomson's authorization in order to enter into that settlement. In any event, if Mr. Houle did indicate to Mr. Hinton on that occasion that he needed Mr. Thomson's authorization to enter into the Facelle settlement, that was the only situation in which any such limitation on Mr. Houle's authority was raised.

15. Some settlement discussions concerning the earlier DiCarlo grievance (dated October 17, 1983) were conducted with the assistance of a labour relations officer, but did not result in a settlement. Following those discussions, Mr. Houle telephoned Mr. Hinton on October 28, 1983 and asked if they could "talk and see what kind of a settlement [they could] come up with". Since Mr. Hinton was amenable to such discussions, he agreed to meet with Mr. Houle at his (Mr. Hinton's) office on the following Tuesday morning. At that meeting, Mr. Houle and Mr. Hinton orally agreed to a settlement of Mr. DiCarlo's grievance by which the respondent would restore Mr. DiCarlo's employment with the respondent, and pay a sum equivalent to "two weeks' pay" to the applicant for disbursement to Mr. DiCarlo. Mr. Houle gave Mr. Hinton no indication whatsoever that the oral settlement required authorization or approval by any other member of management. Pursuant to that settlement, Mr. DiCarlo returned to work for the respondent on the following morning. However, the compensation portion of the settlement remains unpaid because Paul Zaphe, a Vice-President in the respondent's Montreal office, found that part of the settlement to be unacceptable. Although Mr. Hinton dealt directly with Mr. Yaphe in settling a grievance which was "more major" than Mr. DiCarlo's grievance, there is nothing in the evidence which suggests that such dealings precluded Mr. Hinton from settling other grievances with Mr. Houle, as he had done in the past.

16. Under the circumstances, we are satisfied that Mr. Houle was acting within the scope of his apparent authority, if not his actual authority, when he entered into the aforementioned settlement on November 1, 1983. Nothing was said or done at or prior to that meeting to notify Mr. Hinton that Mr. Houle did not have authority to bind the respondent to a settlement of the grievance on those terms, which involved the reinstatement (or recall) of Mr. DiCarlo and the expenditure of under \$1,500. The reasonableness of Mr. Hinton's reliance upon his conclusion that Mr. Houle had such authority is supported not only by the context in which that settlement was reached, but also by the history of dealings between Mr. Hinton and Mr. Houle concerning settlement of grievances. (With respect to the concept of apparent authority in the context of grievance settlements, see generally *Urban Mechanical Contracting 1979 Ltd.*, *supra*; *Re Corporation of the Borough of Etobicoke* (1982), 5 L.A.C. (3d) 52 (Kennedy); and *Canadian International Paper Company and Local 343 of the Canadian Paperworkers Union*, unreported award dated June 8, 1981 (Brunner).)

17. For the foregoing reasons, the Board, pursuant to section 124 of the *Labour Relations Act*, hereby directs that the respondent Perfection Rug Co. Ltd. forthwith pay to the applicant Local Union 2965, Resilient Floorworkers, U.B.C.J.A., for disbursement to the grievor Tony DiCarlo, the sum of \$1,200.00 (that is, \$16.00 per hour x 37.5 hours x 2 weeks), plus interest calculated in the manner described in Practice Note No. 13 dated September 8, 1980; and the sum of \$262.50 (that is, \$3.50 per hour x 37.5 hours x 2 weeks) for disbursement by the applicant to the vacation, holiday pay, health and welfare, pension, and S.U.B. funds specified in the collective agreement. (Counsel for the applicant advised the Board that his client was prepared to waive any interest or penalty on the "benefits" portion of the award.)

2607-82-M Labourers' International Union of North America, Local 247, Applicant, v. Plibrico (Canada) Limited, Respondent

Construction Industry Grievance – Employer – Whether respondent employer of employees performing work in question – Work not performed pursuant to collective agreement – Respondent merely reacting to decision of project owner – No scheme to deprive applicant's members of work – No violation of requirement to employ union members only

BEFORE: R. A. Furness, Vice-Chairman, and Board Members C. A. Ballentine and J. A. Ronson.

APPEARANCES: *S. B. D. Wahl and M. Sullivan for the applicant; R. D. Perkins, G. Gerber and Mel Perkins for the respondent.*

DECISION OF THE BOARD; January 3, 1984

1. The applicant has referred a grievance concerning the interpretation, application, administration or alleged violation of a collective agreement to the Board for final and binding determination.

2. The applicant has grieved on its own behalf, on behalf of its members and on behalf of the employees of the respondent that from and after January 1, 1983, the respondent has violated and continued to violate the provincial collective agreement between the employer bargaining agency and the Labourers' International Union of North America, Ontario Provincial District Council on behalf of its affiliated local trade unions (the "collective agreement") effective from June 9, 1982, until April 30, 1984, in connection with the work covered by the collective agreement at the respondent's Lake Ontario Cement ("LOC") construction project in Picton (the "project"). The applicant alleged that the respondent had failed or refused to employ and continue to employ only members of the applicant in good standing to perform work covered by the collective agreement and hire the said employees through the applicant's hiring hall. Further, or in the alternative, the applicant alleged that the respondent failed or refused to engage only subcontractors who are in contractual relations with the union and or/its affiliated bargaining agents contrary to the collective agreement. The applicant has also alleged that the respondent has failed to pay proper wage rates, vacation pay and statutory holiday pay and failed or refused to make and pay the required contributions, deductions and allowances with respect to union dues, working dues, welfare, pension, travel allowance and industrial grading and retraining as and when required by the collective agreement. The respondent has denied that there has been any violation of the collective agreement.

3. In 1975 the respondent constructed the riser and cyclone components in a number of kilns for LOC. Since 1975 the respondent has been engaged in performing maintenance and replacement functions for LOC. Every six months or so it is necessary for the risers and cyclones to be scaled down with a twenty foot bar. The scaling with the bar removes clinker from the risers and cyclones blocks of material weighing up to 200 pounds. This is a hazardous job and LOC has depended upon the expertise, safety and knowledge of the respondent to perform this work for it. This involves the construction of a scaffold from which the work is performed. Since 1976, LOC has been gradually performing more of the work with its own employees. For example, the tearing out and replacement of the refractory brick in the kilns

has been done more and more by the employees of LOC. This process has been accompanied by the purchase of some of the materials required by LOC from the respondent. On these occasions, the respondent frequently acts as an advisor and a technical consultant to LOC. In January of 1983, LOC requested the respondent to scale down the riser and cyclone in one of its kilns. The respondent accepted this work.

4. In order to perform this work at Picton the respondent hired two labourers from the applicant's hiring hall to perform the scaling work. The two labourers were on the job on Monday, January 10th and Tuesday, January 11th, when the respondent's supervisor on the job, Mel Perkins, was directed by the plant manager of LOC, Leo Finnegan, to terminate the two labourers. It was the intention, as subsequently executed by LOC, to employ two of its employees to perform the work. The respondent's supervisor checked with his head office in Burlington and reluctantly discharged the two members of the respondent.

5. LOC is party to a collective agreement with the United, Cement, Lime & Gypsum Workers' International Union, Local 387 ("Local 387"), effective from December 1, 1980, to November 30, 1983. Under the terms of this collective agreement in article 1.04, LOC agrees to make every reasonable effort to eliminate or reduce the contracting out of work. That article also provides a provision for giving notice where contracting out is used. Article 1.05 also provides that any employee in the bargaining unit on layoff will be given an opportunity to work on construction projects of LOC if the employee meets the requirements of the contractor.

1:04 CONTRACT WORK

Section 1. The Company agrees it will make every reasonable effort to eliminate or reduce the contracting out of work.

Section 2. In the event that it does become necessary to contract out work, the following procedure shall apply:

- (a) The Plant Manager or his replacement and the Department Head concerned will meet with the Plant Committee at least fourteen (14) days prior to the proposed contracting out of the work for the purpose of attempting to find ways to reduce or eliminate such work.
- (b) The Company will confirm its intention to contract out work in writing, signed by the Plant Manager or his replacement, to the Local Union and outline the reasons for such work.
- (c) The satisfactory conclusion of the above shall be signed by both parties or the matter may be referred to the grievance procedure to determine the reasonableness of the position of the parties. A reasonable position shall always be determined to mean that qualified Bargaining Unit members should do the work, if at all possible, within the time limits necessary for the efficient operation of the Plant.

Section 3. In the circumstances where the fourteen (14) day advance notice cannot be given, the Company agrees to give such notice as is reasonably possible and to follow the procedure as outlined above.

Section 4. While the Company reserves the right to contract such work, it agrees it will not be done if it will result in layoff of members of the bargaining unit.

Section 5. If the Union disagrees with the Company's action in contracting-out, the matter will be referred to resolution by the Grievance Procedure.

Section 6. With the exception of original warranties, equipment or machinery that is repaired or reinstalled under manufacturer's guarantee shall follow the procedure established in Section 2.

1:05 LAYOFF

Any employee in the bargaining unit that is on layoff will be given an opportunity to work on construction projects at the Picton Plant or Cherry Street Packhouse of the Company, if the employee meets the requirements of the contractor.

6. At the time of the hearing of this application, LOC had approximately 75 of its production employees on layoff. While the employees of LOC had not previously expressed any willingness or interest to perform the hazardous work of scaling, in January of this year the representatives of Local 387 requested an opportunity to have two of its unemployed members in the bargaining unit perform the work in question. The previous lack of interest by employees of LOC to perform scaling was the reason LOC did not provide notice pursuant to article 1.04. It was the position of LOC that in order to further its own good industrial relations with Local 387, it would comply with their request to have the employees work on the scaling. It was the position of both the respondent and LOC that the awarding of this work to two employees of LOC was not performed under the provisions of article 1.05 of LOC's collective agreement with Local 387.

7. The work performed by the respondent and the employees of LOC consisted of the scaling-down of the riser and cyclone by the two members of Local 387. Mel Perkins, the supervisor employed by the respondent, supervised the work from a technical point of view, and one of the respondent's carpenters used his expertise in erecting the swing-stage scaffold to be used in the riser and cyclone.

8. The work performed by the four members of Local 387 was performed under the guidance of Mr. Perkins. However, it is quite clear from the evidence that Mr. Perkins had to obtain the permission and assistance of Mr. DeMille, a supervisor for LOC, in order to transmit orders to the members of Local 387. During the course of the scaling, Mr. DeMille would, from time to time, remove employees working on this job to perform other work for LOC.

9. The applicant argued that the respondent had unlawfully subcontracted the work

performed by the members of Local 387 contrary to the provisions of the trade appendix for the masonry trades, article 2.01, and also contrary to 1.04 of the collective agreement referred to in paragraph one. Articles 1.04 and 2.01 state:

1.04 An individual Employer desirous of sub-contracting any work encompassing the skills of a mason tender as described in Article 2, shall only sub-contract such work to a sub-contractor for whom the Union holds bargaining rights.

2.01 The Employer recognizes the Union work jurisdiction shall include that work which has been historically or traditionally or contractually assigned to members of the LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA in the tending of Masons including unloading, mixing, handling, and conveying of all materials used by Masons including Refractory by any mode or method; the unloading, erecting, dismantling, moving, and adjustment of scaffolds; the starting, stopping, fueling, oiling, cleaning, operating, and maintenance of all mixers, compressors, mortar pumps, fork lifts, tuggers, and other devices under the direction of the Employer or his representative.

The respondent argued that it was the victim of a change in design by LOC when the latter made a determination after pressure by Local 387 to have the few days work required for the scaling operation to be performed by its laid off members.

10. In the view of the Board, the respondent has merely abided by the decision of LOC to satisfy the desires of its own bargaining agent Local 387 with little thought for the effect that this decision would have on the respondent in its bargaining relationship with the applicant. The Board finds that the respondent acted in good faith and that the change in plans by LOC was entirely the decision of LOC. The respondent has had an ongoing relationship with LOC and regardless of how much of its services are used in the form of tasks performed by members of the applicant, the respondent has a considerable amount of business with LOC in supplying it with materials for its operations.

11. The Board finds that the work of scaling therisers and the cyclones was not performed pursuant to the provisions of article 1.05 of the collective agreement with Local 387. In *York Condominium Corporation No. 46* and/or *Medhurst Hogg and Associates Limited*, [1977] OLRB Rep. Oct. 645, the Board enunciated a series of criteria in order to determine which of two or more parties is the employer of persons who perform the work. The Board proposed a seven-fold criteria to determine the relationship of employer and employee. These criteria are 1) the party exercising direction and control over the employee performing the work, 2) the parties bearing the burden of remuneration, 3) the party imposing the discipline, 4) the party hiring the employee, 5) the party with the authority to dismiss the employee, 6) the party who is perceived by the employee to be the employer and 7) the existence of an intention to create the relationship of employer and employee.

12. With respect to the first criterion, the Board finds that LOC, through Mr. DeMille, exercised the effective direction and control over the employees who were performing the scaling. Mr. Perkins was merely an advisor and was not a director for the respondent or its representative within the meaning of article 201. He was not exercising direction and control over

the employees. With respect to the second criterion, LOC was bearing the burden of remuneration. With respect to the third criterion, there was no evidence of any discipline being imposed. With respect to the fourth criterion, it appears inferentially that LOC had initially hired the employees and was merely bringing them back for the purpose of offering them a short period of employment during their layoff. With respect to the fifth criterion, there is no evidence regarding the dismissal of any of the employees who performed the scaling. With regard to the sixth criterion, there is some evidence that the employees who were performing the scaling regarded LOC as their employer since they were reluctant to take directions from Mr. Perkins. With respect to the seventh criterion, it appears that there was certainly no intention to create the relationship of employer and employee as far as the respondent was concerned. On the other hand, the employees who performed the scaling were employees of LOC on layoff. In examining these seven criteria, the Board inescapably reaches the conclusion that the work of scaling was being performed by employees of LOC and not by employees of the respondent.

13. While the Board understands the concern and anxiety of the applicant with regard to the bumping of its own members of a job which they would normally do as a result of pressure by Local 387, the immediate concern before the Board in this application is whether or not the respondent has violated the provisions of the collective agreement referred to in paragraph one. On the evidence before it, the Board is not prepared to find a scheme or conspiracy to defeat the bargaining rights of the applicant and to deny its members work. On the other hand, the Board does find that an industrial employer seeking to maintain its best possible relationship with Local 387 has made a calculated decision which has impacted on, not only the members of the applicant, but also upon the respondent which was engaged on this project on a cost plus basis. In the result, this application is dismissed.

1146-83-R; 1682-83-U Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Applicant, v. **Seven-Up/Pure Spring Ottawa**, A Division of Seven-Up Canada Inc., Respondent, v. Seven-Up/Pure Spring Division Employees Association, Intervener

Certification Where Act Contravened – Interference in Trade Unions – Practice and Procedure – Unfair Labour practice – Policy reasons for non-disclosure of settlement discussions – Board not permitting calling of LRO as witness – Settlement of complaints and agreement to vote including employer undertaking to mail copies of Board notice to employees – Respondent not receiving notices in time to comply – Copies given by hand day before vote – Whether results of vote nullified – Whether employer letter indicating preference for existing employee association exceeded bounds of free speech right – Whether finding of improper threats and promises justifying certification without vote – Number of complaints settled not taken into consideration in determining s.8 issue – New vote directed

BEFORE: Owen V. Gray, Vice-Chairman and Board Members

J. Wilson and B. L. Armstrong.

APPEARANCES: E. G. Posen and Bob Hill for the applicant/complainant; C. E. Humphrey, M. Mirsky and R. French for the respondent; H. Busch for the intervener.

DECISION OF THE BOARD; January 13, 1984

1. File No. 1146-83-R involves an application for certification in which a pre-hearing representation vote was requested by the applicant and directed by the Board to be taken of the employees of the respondent in the following bargaining unit:

All employees of the respondent at the City of Ottawa, save and except foremen and supervisors, persons above the rank of foreman and supervisor, and office and clerical staff.

That vote was taken September 29, 1983. Of the 160 employees on the voter's list agreed to by the parties, 150 cast ballots. 73 of these were marked in favour of the applicant and 77 against. There was also one ballot cast by a person not on the list. It was segregated and not counted.

2. File No. 1682-83-U is a complaint by the applicant that the respondent has violated the Act by mailing to its employees a letter dated September 23, 1983. This, together with other acts and omissions of the respondent, forms the basis of a request now made in the certification application that we certify the applicant without a vote pursuant to section 8 of the Act or, alternatively, set aside the results of the vote of September 29, 1983 and order a second representation vote.

3. By agreement of the parties, these two matters were consolidated at hearing, and the name "Seven-Up/Pure Spring Ottawa" appearing in the style of cause was amended to read: "Seven-Up/Pure Spring Ottawa, A Division of Seven-Up Canada Inc.".

I

4. Although the inferences to be drawn from them are very much in dispute, the facts relevant to the issues before us are not. These facts were elucidated for us in the statements of counsel at hearing. There was also a contested issue whether further evidence should be heard by the Board before entertaining argument. Before dealing with our ruling on that issue and the reasons for it, we will set out the facts as they were related to us by counsel.

5. The applicant's organizing drive commenced in the summer of 1983, and culminated in the filing on August 26, 1983 of the certification application now before us. During the period August 12 to September 12, 1983, the applicant union filed 13 unfair labour practice complaints against the respondent. In accordance with its usual practice, the Board appointed a labour relations officer to inquire into the matters complained of and endeavour to effect a settlement. The same officer was appointed to confer with the parties with respect to arrangements for the prehearing vote requested in the certification application. The officer's endeavours culminated in a meeting held September 12, 1983 in Ottawa. The meeting was attended by representatives of the respondent company, the applicant union and the intervener Seven-Up/Pure Spring Employees' Association ("the Association"). A settlement was effected, and reduced to writing, in the following terms:

THIS AGREEMENT entered into this 12th day of September, 1983.

BETWEEN:

CANADIAN UNION OF UNITED BREWERY, FLOUR, CEREAL,
SOFT DRINK AND DISTILLERY WORKERS

hereinafter called "the Union"

- and -

SEVEN-UP/PURE SPRING OTTAWA

hereinafter called "the Company"

- and -

SEVEN-UP/PURE SPRING EMPLOYEES' ASSOCIATION

hereinafter called "the Association"

RE: Complaints Filed Under Section 89 of the Ontario Labour Relations
Act Board File Numbers 1024-83-U to 1034-83-U, 1188-83-U, 1189-
83-U, 1249-83-U, 1275-83-U

The parties hereto agree to settle these matters and they are settled
as follows:

1. The Company acknowledges that it has violated the Ontario Labour

Relations Act in relation to the above-captioned complaints filed under Section 89.

2. The Company and the Union agree to the Labour Relations Board directing the posting of a "Notice to Employees" with the text as attached hereto. The Company agrees to mail copies of the notice to all employees in the bargaining unit as agreed to by the parties. The notice to be mailed to employees the day after receipt of the notice by the Company.
3. The union hereby withdraws and abandons and agrees to not further prosecute the above-captioned complaints filed under Section 89 of the Labour Relations Act.
4. The Union Agrees that it will not rely on or refer to the above-captioned complaints filed under Section 89 of the Labour Relations Act or any of the incidents referred to in the complaints, or any other act or incident which has occurred to the date of this Agreement in making any application with regard to the Company under Section 8 of the Ontario Labour Relations Act.
5. The parties hereto agree that the existence of the Association and the Association Agreement with the Company does not affect the right of the Union to make its application for certification Board File No. 1146-83-R.
6. The parties hereto agree that this Agreement is a matter between the parties and they will not release this Agreement or its contents to anyone who is not a party to the Agreement other than the Ontario Labour Relations Board.

CANADIAN UNION OF UNITED BREWERY, FLOUR, CEREAL,
SOFT DRINK AND DISTILLERY WORKERS

"Paul Poirier"

SEVEN-UP/PURE SPRING OTTAWA

[illegible signature]

SEVEN-UP/PURE SPRING
EMPLOYEES' ASSOCIATION

[illegible signature]

The attached "Notice to Employees" referred to in paragraph 2 of this Agreement reads as follows:

THE LABOUR RELATIONS ACT

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

We have posted this Notice in compliance with an Order of the Ontario Labour Relations Board issued after the Company agreed that it violated the *Labour Relations Act* by interfering with the right of employees to join a trade union.

The Act gives all employees these rights;

To organize themselves;

To form, join and participate in the lawful activities of a trade union;

To act together for collective bargaining;

To refuse to do any and all of these things.

We assure all of our employees that we will not do anything that interferes with these rights.

SEVEN-UP/PURE SPRING OTTAWA

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

DATED this day of , 1983.

It should be noted that this Agreement was executed by a representative of the Association, which had been named as an interested party in the certification application and had filed an intervention in that application. The status of the Association for the purposes of the certification application was disposed of by paragraph 5 of the Agreement. Although the Association intervened again in the instant section 89 complaint, at the hearing its representative advised the Board that the Association would not be taking any part in the proceedings.

6. The circumstances of execution of the September 12th Agreement are important to an assessment of subsequent events. Settlement of the outstanding complaints and arrangements for the pre-hearing representation vote were both under discussion September 12th. One of the items discussed was the date on which the vote would be held. When a consent order and mailing were discussed as a means of settling the complaints, the applicant was naturally concerned to know when the proposed mailing would occur in relation to the day of the vote.

By paragraph 2 of the proposed Agreement, the release by this Board of an agreed upon direction was to trigger the mailing by the employer. The applicant wanted to know how long it would take the Board to release the contemplated decision and bilingual notices. The labour relations officer is said to have told the parties, after speaking to the Registrar by telephone, that the decision and Notices could be released three days after the execution of the agreement of the parties. On the basis of that information, the applicant agreed both to the settlement contained in the agreement of September 12th and to a pre-hearing vote date of September 29, 1983.

7. The contemplated Board decision was issued dated Thursday, September 15, 1983. It appears the decision was not mailed until the following Tuesday, September 20, 1983. On that day copies of the decision and attached Appendix (in English and French) were mailed to, *inter alia*, the respondent's Toronto counsel and the Association. However, copies were not addressed or mailed directly to the respondent in Ottawa. Counsel for the respondent filed with us his copy of the decision and covering letter. Although that covering letter had been rubber stamped "Sept. 22/83", Mr. Humphrey was unable to advise us whether that was the day on which it and the enclosures were received at his office.

8. On September 23, 1983, Mervin Mirsky, the President of the respondent, sent the following letter to each of the employees in the bargaining unit:

September 23, 1983.

Dear [the first name of employee inserted in handwriting]

In August of this year we wrote to you about the attempt being made by a Union to act as your representative instead of your Seven-Up/Pure Spring Employees' Association. To correct the many inaccurate and untrue statements and claims that have been made, I would like to reconfirm to you the vitally important reasons for your staying with the Association.

1. There will be no Union dues or assessments, all of which would be deducted from your pay. Your Association charges no dues whatever.
2. In all negotiations during the year and prior to yearly wage negotiations, you will be represented by your fellow employees. With a Union, outside persons move in to intervene.
3. Your Association will be able to represent you regarding *any* problem – as it has in the past – of a personal or family nature.

Unlike other companies in our industry, we have always provided our regular employees with full employment – 5 days a week – 52 weeks a year.

Under the law you have a right to join any Union or Association of your choice – and we will not interfere with your right. However, bearing in mind the advantage of staying with your Association, I would ask that you vote a simple “NO” as indicated below:

The balance of the first page is taken up with a full size facsimile of a representation vote ballot, on which an “X” has been placed opposite the word “NO”. The second page of the letter continues:

Over the past years your Association has served you very well – and its services will improve in the future. You don’t need a Union.

In order to keep your Association, you must get out and vote. The vote will be here at the plant and I repeat *will be by secret ballot* so you can decide what you want without fear or favour from anyone.

Sincerely,

Mervin Mirsky.

9. We were told that the Association has been in existence for some time, and has entered into “agreements” with respect to terms and conditions of employment on a yearly basis since at least 1979. The respondent’s Reply and the Association’s Intervention in the certification application make reference to an existing agreement between them covering the period to December 31, 1983. If that agreement were a collective agreement, its existence would bar the applicant’s certification application. The parties have agreed that this agreement is not a bar. No attempt was made to establish that the Association is a trade union.

10. Mr. Humphrey advised us that on Tuesday, September 27th, two days before the vote, he first became aware his client had not received the Board’s order and, consequently, had not mailed the notices contemplated by the September 12th Agreement. He then had certain discussions with the labour relations officer whose efforts had resulted in the September 12th Agreement. That officer spoke, in turn, to counsel for the applicant, Mr. Posen, during a break in another Board proceeding in which Mr. Posen was involved that day. The officer then spoke again to Mr. Humphrey, and thereafter to members of management of the respondent at Ottawa. They, in turn, obtained from the Association its copy of the Board’s order, executed the Appendices attached to it, and handed out copies to its employees at their place of work the following day, Wednesday, September 28, 1983, the day before the vote. Some of the employees received notices in the morning when they reported to work, others received their copies at the end of the day when they returned to the plant after completing their deliveries.

11. This brings us to the one point at which the parties differ over the facts. Mr. Humphrey says that when he became aware on September 27th that no notices had been distributed in the manner contemplated by the September 12th Agreement, he recognized that such notices could not then be distributed prior to the date set for the representation vote unless the notices were handed to employees at their place of work. He says he discussed this method of distribution with the labour relations officer, who undertook to speak about it to Mr. Posen. Mr. Humphrey says that in his second conversation with the labour relations officer, he was

told Mr. Posen had agreed that the notices could be handed to employees at their place of work. He then left it to the labour relations officer to speak directly with his clients, to arrange to get the necessary materials into their hands. Mr. Humphrey says he took these communications to establish an amendment to the September 12th Agreement, substituting distribution by handout at work on September 28th as the agreed method of distribution of the Notices, in lieu of the mailing referred to in the Agreement. Mr. Humphrey acknowledges that this point was not discussed explicitly, but says he felt it was implicit in his communications with the officer. He says he might have agreed to a postponement of the vote if he had thought the union would complain about the failure to mail the notices despite completion of the proposed handout. Mr. Posen told us he did not learn that the respondent had neither received the order nor mailed notices until he was approached by the labour relations officer on September 27th. He says his reaction to the officer was that the vote could not be postponed at that late date, and that he could see no objection to the employer handing out copies of the notice. He did not, however, consider that by so saying he had agreed to an amendment to the September 12th Agreement altering the method of distribution provided for in that Agreement. While expressing the utmost respect for Mr. Posen, Mr. Humphrey said he wished to call the labour relations officer as a witness to establish, he hoped, that the discussions in which the labour relations officer had engaged had resulted in an amendment of the September 12th agreement. He acknowledged that he could not compel attendance of the labour relations officer without the consent of the Board. He requested that the Board grant its consent. After hearing the submissions of counsel, we ruled orally that such consent would not be granted, for reasons to be delivered later in writing, if requested. Mr. Humphrey requested reasons.

II

12. Section 109 of the *Labour Relations Act* provides:

109. Except with the consent of the Board, no member of the Board, nor its registrar, nor any of its other officers, nor any of its clerks or servants shall be required to give testimony in any civil suit or in any proceeding before the Board or in any proceeding before any other tribunal respecting information obtained in the discharge of their duties or while acting within the scope of their employment under this Act.

Subsection (6) of section 111 of the Act provides:

111.-(6) No information or material furnished to or received by a labour relations officer under this Act and no report of a labour relations officer shall be disclosed except to the Board or as authorized by the Board, and no member of the Board and no labour relations officer is a competent or compellable witness in proceedings before a court, the Board or other tribunal respecting any such information, material or report.

13. Settlement is the preferred method of dispute resolution in labour relations matters, as it is in resolution of disputes of any kind. Settlement saves the time and money of the parties and of the public institutions created to adjudicate disputes and enforce the results of adjudication. The results of settlement will both be and seem more responsive to the parties' real differences than will an adjudicated result. The prospects for settlement are dim unless there can be full and frank communication between the parties, in which they can discuss the

respective strengths and weaknesses of their positions without later having those discussions turned against them if settlement efforts fail. For that reason, the law has always recognized a privilege attaching to such communications, and the courts have refused to entertain otherwise relevant evidence of statements made by the parties to litigation, when those statements were made in the course of discussions entered into bona fide with the object of a possible settlement.

14. One of the primary function of labour relations officers is to endeavour to effect the settlement of disputes submitted to the Board for resolution. This role is mandated by the Act in the case of unfair labour practice complaints (see section 89(2)) and construction industry grievance referrals (see section 124(2)). Labour relations officers are also routinely assigned to other types of application, including certification applications, wherein they also endeavour to achieve either a full settlement of contentious issues or, at least, a narrowing of the issues requiring adjudication. As a review of the Board's Annual Reports will disclose, the vast majority of cases coming before the Board are settled as the result of the efforts of labour relations officers.

15. By the time an application is filed with the Board, the parties have often settled into apparently rigid positions from which they are unable to make settlement overtures directly to the opposite party. In this climate, and in indeed in any situation in which he becomes involved, a labour relations officer functions as more than a messenger. He seeks from the parties, in confidence, information concerning the strengths and weaknesses of their position, the factual context which they feel obliges them to take the positions they have taken, and the accommodations which might be acceptable. The labour relations officer must be in a position to assure each party not only that he or she will treat the information sought as confidential and withhold disclosure from the opposite party, but also that disclosure to the opposite party cannot later be compelled should settlement efforts fail. This confidence must be absolute. It is of little use to a labour relations officer to tell a party that his discussions will be kept confidential if he must, at the same time, admit the existence of a number of exceptions to this rule, any of which may result in the compelled disclosure of their supposedly confidential discussion. In this regard, the legislature has recognized in sections 109 and 111(6) that the common law privilege extended to communications in furtherance of settlement might not be a sufficient protection for the role to be discharged by a labour relations officer. The Legislature has therefore provided in section 109 and subsection 111(6) that the Board's officers may not be compelled to testify respecting information obtained in the discharge of their duties. The firmness of the Legislature's resolve in this regard is demonstrated by the speed with which it responds to any discovery that there is a gap in the protection afforded by these provisions (see *Re Dorothea Knitting Mills Ltd. and Canadian Textile & Chemical Union et al* (1975) 9 O.R. (2d) 378 (Div. Ct.) a decision dated May 13, 1975 to which the Legislature responded in S.O. 1975, C.76, sections 25 and 26, by repealing the predecessors of sections 109 and 111(6) and replacing them with the present provisions. S.O. 1975 C.76 came into force upon receiving Royal Assent July 18, 1975).

16. Sections 109 and 111(6) each afford the Board a discretion to permit disclosure. In exercising that discretion, however, the Board remains sensitive to the importance of the settlement process and the damage that would be done to that process by carving out any exception to the general privilege it assigns to communications in furtherance of settlement: *Crown Electric*, [1978] OLRB Rep. April 344. The Board also recognizes the difficulty, if not the impossibility, of trying to apply the privilege selectively so as to admit, for example,

evidence of isolated statements made by an officer to a party, even for the limited purpose of explaining that party's resulting behaviour: *Auto Jobbers Warehouse Ltd.*, [1982] OLRB Rep. May 649. Quite apart from any question of compelling the testimony of a labour relations officer, the willingness of the Board to accept the testimony of any witness to communications to or from a labour relations officer will be strongly influenced by the Board's concern to protect the integrity of the settlement process, and efficacy of the labour relations officer's important role in that process: *Crown Electric, supra*, and *Auto Jobbers Warehouse Limited, supra* (see also *A. J. (Archie) Goodale Ltd.*, [1977] Can. LRBR 309 (CLRB) at pages 315-316 for a review of this issue as it arises under the Canada Labour Code; and see *CCH Canadian Limited*, [1974] OLRB Rep. June 375 for discussion of the similar principles applicable to the receipt of evidence of discussions with conciliators during the bargaining process and the effect of subsections (2) to (5) of section 111 of the Act).

17. The Board recognizes that a concern for the settlement process must encompass respect for agreements which are the product of that process (see *Crown Electric, supra*; *Bot Construction (Canada) Limited*, [1982] OLRB Rep. Dec. 1811; and, *Ontario Hydro*, Board File No. 0708-82-M, Reported at [1983] OLRB Rep. Nov. 1869.) We recognize that the Board's refusal to compel disclosure by an officer of what he said or was told during the settlement process may hinder enforcement of agreements reached entirely through the medium of the labour relations officer. The answer to this apparent contradiction is simple. The parties are always in a position to ensure that they can later prove the existence and terms of an agreement without requiring the labour relations officer as a witness. When they believe a settlement has been reached, the parties can and customarily do draft and execute a written memorandum of the terms of the agreement. Further, it will normally require little effort for the parties to engage in simple direct communication of some kind to provide oral confirmation of the supposed agreement. For these reasons, we concluded that the prejudice to the settlement process which would be caused by granting our consent to call the officer in the circumstances of this case far out-weighed the prejudice our refusing to do so might cause, particularly as it had been and ordinarily is within the power of the parties to avoid the latter prejudice.

18. After the Board announced its ruling denying consent to call the Labour Relations Officer, both parties reaffirmed their preparedness to argue the matters before us on the basis of the facts outlined by counsel.

III

19. In his argument, counsel for the applicant emphasized that the timing of the release by the Board of the Notice to Employees, as contemplated by the Agreement of September 12th, was highly critical. The union was bound not to make reference to the terms of the Agreement itself. It would only get the benefit of those terms once the employer had complied with the requirement that it admit its wrongdoing in notices mailed to employees. The time frame was critical because the admissions would only have value in relation to the vote if received by the employees within the contemplated time-frame. We were told the method of distribution was important because at least one of the complaints settled by the Agreement of September 12th related to letters written to the employees by the employer and sent to them by mail to their homes. Distribution by some other means in a different time-frame was not, in the submission of counsel, sufficient compliance with the Agreement of September 12th.

In that regard, counsel asked the Board to require a mailing of the original notice if the Board decided to order a second representation vote.

20. Turning to the letter of September 23rd itself, counsel for the union noted this was sent at or after the time the parties originally contemplated that the Notice to Employees would be mailed. It contains no acknowledgement of wrongdoing. In the submission of counsel its content, taken in context, goes beyond the employer's freedom of speech preserved in section 64 of the *Labour Relations Act*. Reviewing the letter paragraph by paragraph, counsel noted the reference in the first paragraph to a letter sent in August, which counsel says was the subject of one of the 13 complaints settled by the terms of the September 12th Agreement. Counsel argued that by referring to that letter the respondent effectively restated a position which it later agreed was unlawful.

21. Counsel said that the first numbered paragraph should be interpreted as an undertaking that the Association will charge no dues in the future, and to take from that that the President of the respondent was in a position to dictate what the Association will charge by way of dues. The second numbered paragraph was said to cast a sinister aura about the union by the use of the words "outside persons move in to intervene". The word "intervene" is used in the sense of "interfere", the applicant said. Even if it was not taken in that sense, it would at least have been taken as meaning that bargaining unit employees would not be involved in bargaining. This is factually incorrect, we were told, as it is the policy of this union to employ a bargaining committee of which bargaining unit employees are members. The applicant argues that the third numbered paragraph, read together with the sentence which follows it, amount to an implied threat that job security will be jeopardized by unionization. References to the Association in the balance of the letter were said to further demonstrate employer control over the Association. Having regard to the tests laid down in *Bell & Howell*, [1968] OLRB Rep. Oct. 695, counsel for the applicant argued that the letter represents a violation of section 64 of the *Labour Relations Act* even in isolation from its context. The context is said to be a Board decision finding thirteen previous violations of the Act and an undertaking to commit no further violations. Counsel said that the distribution of the Notice to Employees on the day before the vote was the first indication to employees of a response to previous breaches, and was inadequate as a response to those breaches both because its manner of distribution failed to duplicate the employer's earlier manner of alleged interference, and because the late distribution afforded the employees insufficient time to absorb and react to the Notices. In the result, counsel urged us to find that the employees were not able to freely express their wishes in the vote conducted September 29th and, indeed, that the cumulative effect of the employer's behaviour was such that the true wishes of the employees are not likely to be ascertained in any new vote.

22. Counsel for the respondent took the position that the posting of the letter of September 23rd was not a violation of the Act, and that even if it was a violation it was not so serious as to warrant a certification without a vote. We were asked to read the letter not as a lawyer would, nor to parse the letter sentence by sentence, but to consider what a reasonable employee would take from the letter as a whole. Counsel described the letter as simply stating facts promoting the employer's past good record as an employer and expressing, within the bounds of free speech, a preference for continued dealings with the Association. Counsel distinguished the references to the Association here from the state of facts which existed in such cases as *Homeware Industries Limited*, [1981] OLRB Rep. Feb. 164 and *Upper Canadian*

Furniture Limited, [1981] OLRB Rep. July 1016, where the employee association was not pre-existing but came into existence during a trade union organizing campaign. With respect to prior events as context for the letter, counsel for the respondent directed us to the language of the agreement of September 12th, and argued that what occurred previously cannot be relied upon or referred to in disposing of the applicant's request for relief. Even if the letter of September 23rd is a violation of the *Labour Relations Act*, the respondent argued, it is not a violation of the same magnitude as the violations which have lead the Board to grant a section 8 certificate in such cases as *Radio Shack*, [1979] OLRB. Rep. Mar. 248, *K-Mart Canada Ltd.*, [1981] OLRB. Rep. Jan. 60, *Norsemen Plastic Ltd.*, [1979] OLRB Rep. Apr. 325, and *Skyline Hotels Ltd.*, [1980] OLRB Rep. Dec. 1811. With respect to the method of distribution of the Notice to Employees contemplated by the September 12th Agreement, counsel for the respondent asked us to note that in vote situations the parties jockey to get their documents in the hands of employees at the last minute. In this respect, counsel asked us to find that the delivery of the Notices to Employees on September 28th may have provided the trade union with an advantage over the position in which they would have found themselves had the employer been able to deliver the Notices by mail within the time frame originally contemplated by the parties.

IV

23. The agreement of September 12th was the successful result of the settlement process discussed earlier in this decision. The Board's treatment of settlements should be such as to encourage the parties to rely on that process as an alternative to adjudication. The parties agreed on the posting and mailing of a Notice of employees. We should give that fact, and the content of the Notice, no more or less weight than we would if that remedy and Notice were provided for in a prior Board decision. A prior Board decision, however, would contain findings of fact on which we could rely in assessing the employer's subsequent conduct (see *Radio Shack*, *supra*). The settlement agreement and agreed Notice do not tell us precisely what the employer did. The applicant says we should fill that gap by looking at the nature and number of the complaints settled by the agreement. We will not. The applicant agreed not to rely on the incidents complained of in making any subsequent application under section 8. It would be overly technical, in the circumstances of this case, to say that that agreement does not apply equally to reliance on the subject matter of the settled complaints in a subsequent section 89 complaint which will, in turn, be the basis of a claim under section 8.

24. We can, however, look at the settlement itself. The respondent does admit that, prior to September 12th, it violated the Act "by interfering with the right of employees to join a trade union." As we are treating the agreed remedy as though it were the result of a Board decision, we must assume that the admitted interference would have led the Board to make a "posting order". The nature and purpose of that remedy were discussed by the Board in *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254, at paragraph 24, in the following terms:

... One of the unique remedies developed by labour relations agencies to respond to the psychological impact of unfair labour practices requires the offender, whether employer or union, to communicate to employees affected by an unfair labour practice that it has been found guilty of violating statutory labour laws and that it will henceforth conform to their requirements. This remedy, in the usual form of a posting of a notice for

sixty days in a conspicuous location(s) in the workplace, was first developed by the Board in *Radio Shack, supra*, although its origin in labour law is ancient. ... In more exceptional cases the posting of a notice will be insufficient and mailing, publishing, and reading of notices may be directed in order to redress the impact of unfair labour practices in question. ... However, we believe the posting of notices should not be confined to exceptional cases because isolated violations of the Act have an undoubted and significant psychological impact on labour relations and the attainment of the statute's objectives. Making employees aware of the fact that an errant employer or trade union cannot violate the Act and that the employee has meaningful legal rights is vital to the success of *The Labour Relations Act*. Admittedly, the effect of the posting requirement often will be difficult to evaluate but this is no reason for inaction. Surely, for example, the fear for the job security will be lessened with the realization that someone more authoritative than the employer has a voice in determining what he can do to those who support a trade union and that someone more powerful than a trade union will protect those who lawfully oppose it. Even a belated notice is better than none, if it helps to dispel any fears, confusion or ill-will created by a situation which has been equitably resolved.

In agreeing to a posting remedy the parties impliedly recognized the likelihood that the employer's admittedly unlawful activities had had the kind of psychological impact referred to in the passage quoted. By also agreeing to mail the Notices, the employer impliedly acknowledged the importance of using that mode of communication to redress the impact of its prior unlawful conduct. If the Notices had been posted and mailed within the time frame contemplated, and if nothing else untoward had happened prior to the vote, the applicant could not have been heard to say that the residual impact of the employer's interference had prevented the employees from expressing their true wishes in that vote. The posting and mailing in that time frame, however, is the only method of redress about which that can confidently be said. Knowing that the employer's prior behaviour constituted illegal interference which necessitated a remedial response aimed at reassuring employees that their right to organize would be respected and could be protected, we can easily say that the vote would clearly have been unreliable if there had been no remedial response at all. Without knowing more about the illegal behaviour admitted by the employer, we can not say with confidence that any remedial response other than the one agreed to September 12th was adequate to ensure the reliability of the vote. In short, quite apart from the effect of the letter of September 23rd, we must be left in doubt about the vote of September 29th simply because the Notices were not mailed in the time frame contemplated. It is not particularly useful to assign responsibility for the acts or omissions which led to that result. Even acts or omissions which are the sole responsibility of the Board will result in the directing of a new representation vote if the Board concludes that those acts or omissions adversely affected a representation vote: *Canadian Johns-Manville Co., Ltd.*, [1979] OLRB Rep. April 209.

V

25. Turning to the letter of September 23rd, we must consider whether, as the employer claims, that letter represents the exercise of the employer's freedom to express his views which is expressly reserved in section 64 of the *Labour Relations Act*, or whether, as the union

claims, it constitutes conduct enjoined by that section. In assessing employer conduct the Board is obliged to take into account the responsive nature of the relationship of employees with their employer. Predictions of what the future holds may constitute threats or promises, if it is in the power of the employer to make the predictions come true and the employees perceive in their employer a willingness to exercise that power in response to the success or failure of their attempt at unionization. In *Viceroy Construction Company Limited*, [1977] OLRB Rep. Sept. 562, the restraint on an employer's freedom of expression was explained in this way:

The Act recognizes that an employer is in the more immediate position to affect an individual's employment relationship, if only by virtue of its freedom to advance, preserve, impede or terminate an individual's employment. Therefore, by the terms of the Act, that very freedom is restricted. In order to protect and promote the collective bargaining process the Legislature has provided that no employer is free to affect a person's job security or conditions of employment when the employer's action is prompted by an anti-union motive, (e.g. section 58 [now 66] of the Act). For the same reason, by virtue of the Act, an employer's freedom of expression regarding possible union representation of his employees is not absolute. While he is of course free to express his view of representation by a trade union he may not use that freedom of expression to make overt or subtle threats or promises motivated by anti-union sentiment which go to the sensitive area of changes in conditions of employment or job security.

26. A mere expression by the employer of its preference to remain non-union will not violate section 64, as the Board noted in *Playtex Ltd.*, [1972] OLRB Rep. Dec. 1027 (at ¶5):

Apart from any electioneering or propaganda published by an employer, it is to be assumed that employees recognize that the employer is not usually in favour of having to deal with the employees through a trade union. Accordingly, it ought not be a surprise to the employees when the employer indicates that he would like to have the employees vote against the trade union. An invitation to employees to vote against the trade union delivered in writing in the absence of any surrounding facts or circumstances which would cause the employees to place undue emphasis on such statement cannot be characterized as undue influence within the meaning of section 56 of the Act. Indeed, employees might consider the fact that the employer is opposed to dealing with them through a trade union as evidence of the fact that union representation would work to the detriment of the employer and to the advantage of the employees. The mere expression of the employer's opinion in such matter, standing alone, is protected by the provisions of section 56 of the Act. The only prohibition on the employer when expressing his views is that such expression of views do not constitute or are not coupled with coercion, intimidation, threats, promises or undue influence.

Any suggestion that unionization will be accompanied by loss of jobs will, however, violate that section: *Dylex Limited*, [1977] OLRB Rep. June 357, *Viceroy Construction Company*,

supra; *Stratton Knitting Mills Limited*, [1979] OLRB Rep. Aug. 801; *Manor Cleaners Limited*, [1982] OLRB Rep. Dec. 1489.

27. Where the employer's message is that future enjoyment of current or previously promised wages, working conditions or benefits is conditional on the outcome of a representation vote, this also constitutes undue influence: *Gestetner (Canada) Limited*, [1971] OLRB Rep. Feb. 62; *J. E. Martel & Sons Limited*, [1972] OLRB Rep. Aug. 811; *Hostess Food Products Limited*, [1975] OLRB Rep. March 218.

28. We agree with counsel for the respondent that in assessing whether the letter of September 23rd went beyond free speech into the realm of undue influence, we must look at the document as a whole and assess it from the point of view of a typical employee receiving it. We are not assisted by the additional suggestion that the letter not be read as a lawyer would read it. Lawyers have no monopoly on imagination or insight; a claim to any superiority in either skill might be questioned. We are obliged here to determine the interpretation the employees in the voting constituency were most likely to place on the contents of this letter, in all the circumstances. One of those circumstances is that their employer had illegally interfered with these employees' rights to organize, in a manner requiring redress by a posting and mailing which, to the knowledge of the author of the letter, had not occurred by the time the letter was mailed. Employees who are aware that their employer is prepared to break the law in order to interfere with unionization will more readily find threats and promises "between the lines" in employer propaganda which, absent the prior illegal behaviour, might have appeared innocuous to them.

29. Turning now to text of the letter of September 23rd, we note that the letter's perspective is that the representation vote of September 29th offered a choice between the applicant trade union and the intervener Association. This takes us to another question of the effect we are to give to the settlement of September 12th. In that settlement the parties, including the Association, agreed that the Association's "agreement" with the respondent did not affect the right of the union to bring this application for certification. Both the reply of the respondent and the intervention of the Association in the certification application make reference to an Agreement which expires December 31, 1983. If this were a collective agreement, it would constitute a bar to this certification application. As the Board has no discretion to ignore statutory bars, it can only give effect to the agreement of the parties by concluding that the Association's agreement with the respondent was not a collective agreement. This conclusion, coupled with the observation that the Association has never established its status as a trade union, must be taken into account in assessing the employer's letter of September 23rd. The vote ordered by this Board was not a choice between two bargaining agents. Put in a light most favourable to the respondent, this mischaracterization of the vote was, in effect, an expression of preference for dealing with the Association.

30. The Board's response to employer expressions of preference for an employee association depends on a number of factors. At one end of the spectrum are the cases which find improper interference when the employer responds to a trade union organizing campaign by suggesting to its employees that they should form an employee association: *Homeware Industries Limited*, *supra*; and, *Zehr's Markets Limited*, [1971] OLRB Rep. Oct. 638 (and see *W. Bolen Enterprises Limited*, [1973] OLRB Rep. Jan. 50 where propaganda leading to a termination representation vote was found improper where the employer suggested that an as yet

unformed employee association might an alternative to continued representation by the incumbent trade union). The employer's demonstrated preparedness to deal with a newly formed employee association may constitute improper interference even if the Association was initially formed at the suggestion of the employees rather than the employer: *Upper Canadian Furniture Limited*, *supra*, where the Board said at paragraph 38:

For an employer to attempt to use his right to free speech to initiate an employee association to compete with a union is not protected by section 56 [now 64]. Even where an employer does not sow the seed of an employee association, its active support for the association may become a potent form of interference in contravention of section 56 [now 64] of the Act. Given their economic dependence on their employer, employees may be readily swayed by employer conduct, even where subtle, which indicates support for an association over a competing union.

31. At the other end of the spectrum are cases like *Smith Beverages Limited*, [1975] OLRB Rep. Dec. 956 and *Milltronics Limited*, [1981] OLRB Rep. Oct. 1435 wherein an employer's express or implied preference for continued collective bargaining with an incumbent employee association was found not to be improper support or undue influence, when the association had trade union status and a history of collective bargaining with the employer. Closer to the first mentioned extreme are cases like *Seven-Up (Ontario) Limited*, [1970] OLRB Rep. May 198 and *Primo Importing and Distributing Co. Ltd.*, [1982] OLRB Rep. Dec. 1869 and [1983] OLRB Rep. June 959. In *Seven-Up (Ontario) Limited*, *supra*, employees responded to a trade union organizing campaign by suggesting that an inactive employee committee be reconstituted or revided. Management responded by meeting with the revived committee. That action, together with others, was found to constitute undue influence on the part of the employer. In *Primo*, the employer extended recognition to, and entered into a purported collective agreement with, an employee association in the shadow of the organizing campaign of the trade union there applying for certification. The Association had been formed by the members of an employee committee which had come into existence after the applicant trade union lost an earlier representation vote. The Board found (at [1982] OLRB Rep. Dec. 1869) that the Association and its agreement were tainted by the employer support which the employee committee had received. It further found (at [1983] OLRB Rep. June 959) that the employer's dealings with the Association constituted interference contrary to section 64 of the Act.

32. Here the Association was formed long before the applicant commenced its current organizing campaign. The respondent's past dealings with it were part of its approach to employee relations. Provided it is not done in the shadow of a trade union organizing campaign, an employer may legitimately deal with and, indeed, encourage the formation of an employee committee or association as a vehicle through which it conducts its employee relations, so long as there is no pretense by either the employer or the Association that the latter is a trade union. One of the employer's purposes in so doing may well be to create an atmosphere in which union organizing is less likely to occur or be successful. As the Board said in *The Globe and Mail Division of Canadian Newspapers Company Limited*, [1982] OLRB Rep. Feb. 189 at 211 (¶48):

There is nothing in the Act which prohibits an employer whose employees are unorganized and who are not the subject of a union organizing campaign, from providing terms and conditions of employment which are

designed to, and may have the effect of causing employees to turn their back on the option of collective bargaining.

So long as neither the employer nor the association pretends the latter is a trade union as defined by the *Labour Relations Act*, the mere existence of the association is not a legitimate ground of complaint by a trade union seeking to organize the employer's employees, and that is so even if the association is clearly under the control of the employer. When the employer expresses a preference for continued dealings with such an association, and no one makes any pretense that the association is a trade union, this no more violates section 64 than would an expression of preference for the non-union status quo made by an employer during a trade union campaign to organize his employees. The pre-existence of an employer supported employee committee or association is, however, an additional potential avenue for improper employer interference in a trade union organizing campaign. The passage quoted earlier from the *Globe and Mail* case continues as follows:

However, once a trade union begins to organize, it is protected by the provisions of section 64 of the Act and the employer is prohibited from acting with an intention to interfere with the selection of a trade union or the representation of his employees by a trade union. The section enshrines the employer's freedom to express his views but makes it an offence to use "coercion, intimidation, threats, promises or undue influence" as a means of thwarting the rights of the trade union and/or its employees. The granting of benefits or the solicitation of employee grievances during the course of a union organizing campaign if motivated even in part by a desire to undermine the trade union, breaches these prohibitions.

If the employer responds to a trade union organizing campaign by changing the character or consequences of its dealings with a pre-existing employee committee or association, or by threatening or promising to do so, that behaviour may constitute a violation of section 64 of the Act just as much as it would if the consequences to employees of such changes were promised, threatened or made directly.

33. Applying these principles to the letter of September 23, 1983, we do not find that the references to the Association constitute interference insofar as they describe in positive terms the *status quo ante* the applicant's organizing campaign. Having described as an advantage of staying with the Association the fact that the Association charges no dues whatever, however, the letter goes on to say that "Over the past years your Association has served you very well - and its services will improve in the future." How can the Association provide improved services while charging no dues, unless it is as a result of the employer's combined willingness and ability to put the Association in a position to do so? In effect, the employer promises the employees they will receive improvements of an unspecified nature through the Association if they keep the Association by voting against the applicant union.

34. Counsel for the applicant took great exception to the second numbered paragraph of the letter. He said the word "intervene" had cast a sinister aura over his client. Asked by the Board whether that word would have been objectionable if modified by the phrase "on your behalf", counsel said the statement would still leave the untrue impression that employees would not be involved in bargaining. While the employer's statement might have been

taken to denigrate or misdescribe the union's intentions or practices, the Board does not normally evaluate the truth or falsity of campaign literature unless the ability of the employees to evaluate such literature is impaired to such an extent that employee wishes can not be determined in a secret vote: *Stauffer-Dobbie Manufacturing Co. Ltd.*, 59 CLLC ¶18,147; *Indusmin Limited*, [1982] OLRB rep. Nov. 1641; *Vogue Brassiere Incorporated*, [1983] OLRB Rep. Oct. 1737. This aspect of the employer's propaganda would not have concerned the Board in the absence of the prior employer interference. The presence here of the prior interference does not warrant any different response. While this paragraph is predicting the future consequences of unionization, the supposed adverse consequence recited is not one over which the employer has or would be thought by its employees to have control. Counsel for the applicant did not argue, and we have no evidence, that the first sentence of this paragraph describes any improvement over the status quo in prior "negotiations" between the respondent and the Association.

35. The third numbered paragraph of the letter does give us concern. Its reference to the Association's ability to represent employees regarding "any problem" carries with it the implication that the applicant will be unwilling or unable to negotiate with the respondent over some items important to employees. Absent prior anti-union employer activity, this might merely be taken as a skillful drafting of the usually permitted allegation that unionization results in some loss of flexibility in employee relations. It is a skillful draft, though, and capable of being interpreted as a message that if the employees chose the union, their employer will not bargain with that union over certain matters on which it has previously been willing to entertain representations from employees through their Association. In assessing whether this latter interpretation was the more likely or dominant one in the circumstances of this case, the anti-union context, which we find was created by the admitted prior anti-union activity, is an important consideration, as appears from the Board's analysis in *Seven-Up (Ontario) Limited*, *supra*:

Again, the letter also contains the following statement, "We want to grow together, in a harmonious and satisfactory way – with continuous employment and continuous income, week after week, throughout the years." This statement read in the context of an anti-union letter would tend to imply that if the union became the employees' bargaining agent, employment might not be continuous and the employees might not have continuous income week after week throughout the years. While it is recognized that a lawful strike might deprive the employees of such continuous employment or income, this statement might well be interpreted that the employer would not want to grow with the employees in a harmonious and satisfactory way – with continuous employment etc., if the union became the bargaining agent of the employees.

In the circumstances of this case, we believe employees were likely to interpret the third numbered paragraph of the September 23rd letter as meaning that the predicted narrowing of bargainable issues would result from the employer's response to unionization rather than from anything inherent in collective bargaining. In short, it would likely be taken as a threat or promise that the employer would not bargain in good faith with this union if the employees were to select it as their bargaining agent.

36. Counsel for the applicant made much of the next sentence in the letter:

“Unlike other companies in our industry, we have always provided our regular employees with full employment – five days a week – 52 weeks a year.”

He asked us to take notice that the “other companies” in the industry in the Ottawa area are unionized companies. We are not sure that is something of which we could take notice without having it from evidence or on agreement of the parties. Even if we could, that fact alone would not make this statement improper, at least in isolation. An employer is entitled to campaign on its record and, to a point, to make comparisons with union employers. There is no evidence before us that the reference to “other companies” contains a hidden message or adds a special emphasis which would be clear to these employees from their knowledge of the industry in Ottawa. We have considered whether the analysis in the quoted passage from *Seven-Up (Ontario) Limited, supra*, can be applied, with similar result, to the statement under consideration. The passage dealt with in the quote from *Seven-Up (Ontario) Limited* was in the form of a statement of future desire. The passage under consideration here is, in form, a statement of past and present fact.

While a similar interpretation is possible in the context of prior anti-union activity, we have concluded that it is not the probable interpretation in the circumstances of this case.

37. While we do not find in the letter of September 23rd any direct threat, express or implied, to job security, we have found improper promises and threats which, in our judgment, constitute undue influence in violation of section 64 of the Act. That finding, together with our earlier observations in paragraph 24 of this decision lead us to conclude that the results of the representation vote of September 29th do not reliably reflect the true wishes of the employees in the bargaining unit described in paragraph 1 of this decision. That vote is, accordingly, set aside, and the Registrar is directed to destroy the ballots within thirty days of the date of this decision.

VI

38. The applicant seeks certification without a representation vote pursuant to section 8 of the Act, which

Where an employer or employers’ organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers’ organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

Certification can be granted under that section only if the following pre-conditions are met:

- (1) The respondent employer must have contravened the *Labour Relations Act*.

- (2) The applicant trade union must have membership support that, in the opinion of the Board, is adequate for the purposes of collective bargaining.
- (3) The respondent employers' contravention of the Act must have resulted in a situation in which the true wishes of the employees are not likely to be ascertained.

39. We have found a violation of the Act. The applicant had sufficient membership support to qualify for a pre-hearing vote. The result of that vote, while unreliable as an indication of the true wishes of the employees, is at least consistent with the union's having maintained that level of support even in the face of the employer's activities. On that basis we feel the applicant has the membership support requisite for a certification without a representation vote pursuant to section 8 of the Act. We have already concluded that the true wishes of all the employees were not likely ascertained in that representation vote. The question which remains is whether the true wishes of the employees are likely to be ascertained in a new representation vote.

40. Not every violation by an employer of the *Labour Relations Act* creates a climate in which employee wishes can in no circumstances be ascertained. The presence of the third of the pre-conditions to section 8 certification is a question of fact which is determined by the Board on a case by case basis. The factors which have influenced this determination were reviewed by the Board in *The Globe and Mail Division of Canadian Newspapers Company Limited* [1982] OLRB Rep. Feb. 189:

The Board has found in a number of cases that the employer, in violating the Act, made threats to the continued job security of his employees conditional on whether the union succeeded in its attempt to become certified. In these cases, the Board concluded that the employer violation of the Act was such as to make it unlikely that the true wishes of the employees could be ascertained. An employee is unable to express his true wishes where he has been told by his employer, either expressly or impliedly, and has reason to believe, that the selection of a union may cause the company to reduce the scale of its operation or close down with an attendant reduction in the number of jobs. (See *Dylex Limited*, *supra*, *Lorain Products (Canada) Ltd.* [1977] OLRB Rep. Nov. 734, *Riv-erdale Frozen Foods Limited*, [1979] OLRB Rep. April 338, *Straton Knitting Mills Limited*, [1979] OLRB Rep. Aug. 801, *Sommerville Belkin Industries Limited*, [1980] OLRB Rep. May 79] and *A. Stork and Sons Ltd.*, [1981] OLRB Rep. April 419.)

The Board has also applied the section where the cumulative effect of a range of unlawful employer activities, none of which taken separately might call the section into play, has the effect of undermining the confidence in the rule of law which a reasonable employee is presumed to have and which gives a reasonable employee the confidence to make a free choice. In these circumstances the Board is forced to the inevitable

conclusion that the true wishes of the employees are not likely to be ascertained. (See *Radio Shack, supra*, *K-Mart, supra*, *Skyline Hotel Limited, supra* and *Robin Hood Multi Foods* [1981] OLRB Rep. July 972.)

In assessing whether employer breaches of the Act so adversely affect the ability of employees to express their wishes as to justify certification without a vote, the Board considers whether remedies for those breaches can be so crafted as to create a climate in which a representation vote might successfully ascertain the wishes of the employees: *Great Canadian Pizza Co.*, [1980] OLRB Rep. Feb. 216; *Simcoe Manor Home for Aged*, [1980] OLRB Rep. Nov. 1696; *Homeware Industries Ltd.*, [1981] OLRB Rep. Feb. 164; *A. Stork & Sons Ltd.*, [1980] OLRB Rep. April 419; *Upper Canadian Furniture Ltd.*, [1981] OLRB Rep. July 1016 and *Primo Importing and Distributing Co. Ltd.*, [1983] OLRB Rep. June 959.

41. The possibility of a section 8 application was contemplated by the parties' agreement of September 12, 1983, which provided that the subject matter of the complaints settled by that agreement could not later form the basis of a section 8 application. It is less than clear whether paragraph 4 of the agreement prevents reliance on the agreement or the remedy provided for therein as part of a later argument in favour of section 8 relief. The applicant, of course, argues that we should take into account the fact that thirteen prior complaints were settled with a posting order acknowledging violation of the *Labour Relations Act*. We think it inconsistent with the provisions of the agreement that the number of complaints settled by that agreement should form any part of our assessment of the applicant's claim for relief under section 8. We observe, however, that to do so would work against the applicant's argument. If, as we are obliged to assume, a posting and mailing within the time-frame contemplated by the agreement would have adequately counteracted the effect of thirteen "counts" of employer interference, then we are unlikely to conclude that no remedy for a fourteenth and allegedly similar count could restore a climate in which the wishes of employees could be ascertained in a representation vote.

42. We believe that the adverse impact of the respondent's contravention of the Act can be rectified so as to enable the wishes of the employees to be ascertained in a new representation vote. In order to rectify that adverse impact, the Board orders that the respondent:

- (1) cease and desist violating section 64 of the *Labour Relations Act*;
- (2) permit at least two representatives of the applicant to forthwith hold a meeting on the respondent's premises with all employees in the voting constituency, out of the presence of any member of management, during normal working hours without loss of pay, such meeting to be a minimum of one hour in length and at least three full days prior to the date ultimately set for the conduct of the new representation vote ordered by the Board herein;
- (3) provide the applicant with reasonable access to and use of bulletin boards where notices to employees are regularly posted, until the conclusion of the representation vote ordered by the Board herein;
- (4) post copies of the attached Notices marked Appendix in both English

and French as supplied by the Board, in equal numbers in conspicuous places on its premises, including commonly used bulletin boards, where they are likely to come to the attention of the employees, and keep the Notices posted for sixty days or until the conclusion of the representation vote ordered herein, whichever last occurs, taking reasonable steps to ensure that the said Notices are not altered, defaced or covered by any other material;

- (5) give a representative of the applicant reasonable physical access to its premises at reasonable times and from time to time so that the applicant can satisfy itself the posting requirements of the next proceeding sub-paragraph have been and are being complied with; and,
- (6) at its own expense reproduce letter size copies of each attached Appendix and at its own expense send one executed copy each of the English and French versions by ordinary mail to the home address of each employee in the bargaining unit, unaccompanied by any other material.

43. Although the applicant asks that we also order the respondent to mail copies of the Notices previously agreed to, we do not see that any useful purpose would be served by doing so, having regard to the posting and mailing provisions set out above.

44. The Board further directs that a new representation vote be conducted among the employees of the respondent in the voting constituency described in paragraph 1 of this decision. Those eligible to vote are all employees in that voting constituency on the date hereof who do not voluntarily terminate their employment, or who are not discharged for cause, between the date hereof and the date the vote is taken. Voters will be asked to indicate whether or not they desire to be represented by the applicant in their employment relations with the respondent.

45. The Board hereby appoints a Labour Relations Officer to meet with the parties within ten days of the date of release of this decision by the Board, in order to make arrangements for the conduct of the vote directed by this decision.

46. The matter is referred to the Registrar.

[NOTE: The French version of the Notice to Employees has been omitted.]

Appendix

The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE ISSUED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD, ISSUED AFTER A HEARING IN WHICH BOTH THE COMPANY AND CANADIAN UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK AND DISTILLERY WORKERS HAD THE OPPORTUNITY TO PRESENT EVIDENCE. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT AND HAS ORDERED US TO INFORM OUR EMPLOYEES OF THEIR RIGHTS.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

- TO ORGANIZE THEMSELVES;
- TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A TRADE UNION;
- TO BARGAIN AS A GROUP, THROUGH A REPRESENTATIVE OF THEIR OWN CHOOSING;
- TO ACT TOGETHER FOR COLLECTIVE BARGAINING;
- TO REFUSE TO DO ANY AND ALL OF THESE.

WE ASSURE OUR EMPLOYEES THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES WITH THE RIGHTS LISTED ABOVE.

WE WILL NOT ENGAGE, IN ANY CONDUCT WHICH INTERFERES WITH THE EMPLOYEES' FREE SELECTION, ORGANIZATION OR ADMINISTRATION OF THE CANADIAN UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK AND DISTILLERY WORKERS.

WE WILL PERMIT THAT UNION TO HOLD A MEETING WITH ALL EMPLOYEES IN THE VOTING CONSTITUENCY, WITHOUT LOSS OF PAY, ON COMPANY PREMISES AND DURING WORKING HOURS AS ORDERED BY THE BOARD.

WE WILL PERMIT THAT UNION REASONABLE ACCESS TO THE BULLETIN BOARD COMMONLY USED TO POST MESSAGES TO EMPLOYEES UNTIL THE COMPLETION OF THE REPRESENTATION VOTE AS ORDERED BY THE BOARD.

WE WILL ALLOW OUR EMPLOYEES, THROUGH THE TAKING OF ANOTHER REPRESENTATION VOTE ORDERED BY THE BOARD, TO FREELY DECIDE WHETHER OR NOT THEY WISH TO BE REPRESENTED BY THE CANADIAN UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK AND DISTILLERY WORKERS.

IF THE MAJORITY OF EMPLOYEES VOTING CAST BALLOTS IN FAVOUR OF CANADIAN UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK AND DISTILLERY WORKERS AND THE ONTARIO LABOUR RELATIONS BOARD CERTIFIES THAT UNION AS THE EMPLOYEES' REPRESENTATIVE, WE WILL MEET AND BARGAIN IN GOOD FAITH WITH THAT UNION AND MAKE EVERY REASONABLE EFFORT TO MAKE A COLLECTIVE AGREEMENT.

SEVEN-UP/PURE SPRING OTTAWA, A
DIVISION OF SEVEN-UP CANADA INC.

PER: (AUTHORIZED REPRESENTATIVE)

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

1649-83-U United Steelworkers of America, Complainant, v. Shaw-Almex Industries Limited, Respondent

Evidence – Practice and Procedure – Unfair Labour Practice – Witness – Whether no prima facie case – Whether extreme delay in filing and inadequate particulars – Evidence of conversation between party and conciliator or mediator not entertained – Extent of confidentiality attaching to conciliators and mediators reviewed

BEFORE: Owen V. Gray, Vice-Chairman, and Board Members J. D. Bell and W. F. Rutherford.

APPEARANCES: *C. M. Mitchell and N. Carriere for the complainant; James T. Heather, T. Churchmuch and L. Shaw for the respondent.*

DECISION OF THE BOARD; January 4, 1984

1. This is a complaint filed under section 89 of the *Labour Relations Act*. The complainant alleges violations of sections 3, 15, 64 and 66 of the Act. The major complaint is that the respondent has failed to bargain in good faith with respect to the renewal, with amendments, of the parties' last collective agreement, which expired January 31, 1983.

I

2. The respondent made two preliminary objections to the Board's hearing this matter. The first was that the allegations set out in the complaint, and further particularized by the complainant in a two-page schedule filed under cover of its counsel's letter of November 15th, were insufficiently particularized and for that reason violated Rule 72 of the Board's Rules of Procedure. The second objection was that there had been such delay in filing the complaint as should lead the Board to refuse to hear it, in the exercise of its discretion under section 89(4) of the Act. Both objections were argued together.

3. The particulars filed by the complainant alleged that notice to bargain was given January 5, 1983, and the parties first met January 27, 1983. The employer applied for the appointment of a conciliation officer on January 31, 1983. A second meeting between the parties took place March 22, 1983. A "no board" report was issued April 5, 1983, followed by the appointment of a "mediator" by the Ministry of Labour on April 11th. A meeting with the mediator took place April 21, 1983. On April 22nd the complainant began a legal strike. The complainant alleges that no negotiations whatsoever took place during the period April 22 to September 26, 1983. During argument, counsel for the complainant enlarged the complainant's allegations regarding that period, to add that in June of 1983 Mr. Carriere, an official with the complainant trade union, had a conversation with Mr. Shaw in which he requested a further meeting and Shaw told him there would be no point. On September 26th, officials of the union are said to have met with one Jim Heather, a consultant who had negotiated for the respondent in previous years but had not been directly involved in the current negotiations. At this meeting, the complainant says the union put forward a settlement offer to which it had not, to the date the complaint was filed, received a response.

4. The complaint is summarized in paragraph 14 of the complaint's further particulars filed November 15, 1983, which reads:

The union asserts that from the commencement of negotiations, and at the very least from the commencement of the strike in April 1983, the respondent employer has formed an intention not to bargain and not to enter into a collective agreement with the applicant union and has engaged in superficial surface bargaining with no intention of entering into an agreement, and indeed since the commencement of the strike has refused to meet and bargain at all.

The existence of this intention is something which the complainant says may be inferred from the positions taken by and behaviour of the respondent at bargaining meetings and on other occasions during the period up to the filing of the complaint, October 21, 1983.

5. The respondent's argument that the complaint lacked particularity was that the particulars supplied failed to disclose a violation of the Act. The respondent's argument with respect to timeliness was that seven months had elapsed from April 22nd, the point at which the complainant says the respondent formed its intention to violate section 15 of the Act, to November 22, 1983, the date on which the hearing of the complaint commenced. Arguing that a delay of this length is excessive and should result in a refusal by the Board to hear the complaint, the respondent's representative cited a number of Board decisions. Those which dealt with delay in alleging bad faith bargaining, however, ante-dated the amendments to the *Labour Relations Act* which permitted such allegations to form the basis of a complaint under section 89. Other cases cited by the respondent involved certification applications in which the Board refused to entertain allegations of improper conduct where there had been a delay in asserting them. *Fotomat Canada Limited*, [1980] OLRB Rep. Oct. 1397 was cited for the proposition that the Board must be careful to avoid being used by a trade union to supplement its bargaining power when the trade union finds its economic strength insufficient to move the employer from a hard bargaining position.

6. Counsel for the complainant argued that the violation complained of was a continuing one, in which the existence of an improper intention on the part of the employer at one point in time will normally only become apparent from subsequent conduct. He noted the employer had made no allegation that its defence of the complaint had been prejudiced by the delay in filing it.

7. After considering the submissions of the parties, the Board ruled as follows:

We see no merit in the respondent's argument that the complaint lacks particularity. The respondent does not complain that there are allegations of wrongdoing which are too vague for him to investigate and prepare a response. He merely says the complaint alleges no wrongdoing. As to the particulars disclosing the basis of a complaint, we are unable to say at this point that the evidence in support of the facts alleged would not lead us to infer a violation of at least section 15. We are not prepared to dismiss the complaint for failure to disclose a *prima facie* case.

We are unable to say whether the union has delayed until we hear the evidence and assess whether there has been a violation and, if so, when the union could fairly be expected to have been aware of it. If there has been delay, it may effect the remedy. The effect may go so far as to lead to a denial of remedy. We cannot say whether there will be any such effect until we hear the evidence.

We hereby confirm that ruling.

II

8. At the conclusion of the first day of hearing, a question of admissibility of evidence arose during the evidence of Norman Carriere, a staff representative of the United Steelworkers of America with responsibility for the affairs of the bargaining unit covered by the expired collective agreement with the respondent. Through him, the complainant sought to introduce evidence of private conversations between the witness and an officer from the Conciliation and Mediation Service of the Ministry of Labour appointed by that Ministry to act as a “mediator” following the issuance of the “no board” report. The Board expressed concern at receiving such evidence and the respondent thereupon objected to it. The Board’s concern and the respondent’s objection were based both on the relevance of the proposed evidence and the impropriety of receiving it in the face of the relevant confidentiality provisions of the *Labour Relations Act*.

9. Complainant’s counsel argued that evidence of what was said in meetings between the union representative and the mediator was relevant on several grounds. Explanations of the union’s position to the mediator were relevant to show the state of mind of the union and to provide some evidence of what was likely conveyed by the mediator to the respondent company with respect to that position. Evidence of what was said by the mediator to the union concerning the company’s position was said to be relevant to a determination of what the company’s position was at the relevant time.

10. With respect to subsection (2) of section 111 of the Act, counsel for the complainant took the position that the officer who met with the parties following the release of the no board report was not a “mediator” within the meaning of that subsection. He argued that “mediator” in that context means a mediator appointed in the manner contemplated by section 17 of the Act, and noted that the “mediator” in question here had not been so appointed. In any event, the Board has a practice, counsel argued, of hearing evidence of what is said between a mediator and one party to the mediation process in the absence of the other party. In support of this proposition, counsel cited the “Ottawa Journal” case (*The Journal Publishing Company of Ottawa Limited*, [1977] OLRB Rep. June 309, [1977] OLRB Rep. Sept. 549, and [1977] OLRB Rep. Nov. 748). The Board reserved and now delivers its decision on this issue.

11. We agree with counsel for the complainant that the “mediator” referred to in the evidence was not a mediator appointed pursuant to the provisions of section 17 of the Act. He was not a mediator from whom a formal report is contemplated under the Act, nor would his appointment or the duration of that appointment effect the timeliness of lawful economic conflict or of any certification or termination application which might affect the complainant’s bargaining rights. He was not, therefore, “a mediator...under this Act...” within the meaning

of subparagraph (a) of section 111(2) of the Act. The involvement of officers of the Ministry of Labour's Conciliation and Mediation Services, however, does not necessarily end when lawful economic conflict begins. Conciliation officers are regularly made available by the Ministry of Labour after a "no board" report has been released, as in this case, to continue what began as the conciliation process. This role is expressly contemplated by subparagraph (b) of section 111(2) of the Act. In our view, the "mediator" who became involved with these parties was an officer of the sort described in those provisions. He was, moreover, a "person designated by the Minister to endeavour to effect a collective agreement" within the meaning of section 111(4) of the Act and, hence, not competent or compellable as a witness in these proceedings.

12. Although descriptive of the functions of members of a conciliation board, the following passage from the Board's decision in *Trenton Memorial Hospital*, 64 CLLC ¶16,302, aptly describes the role of a conciliation officer, whether acting before or after the release of a "no board" report:

Obviously, if he is to be a successful conciliator, a conciliation board chairman or member must win and retain the personal confidence and trust of both parties to the dispute. It will usually be an essential first step to any settlement of their differences, through the efforts of a conciliator, that the parties are willing, frankly and openly, to discuss their respective positions in private with the conciliator without fear that he will later divulge the confidences of their conversations to the opposite party. One must also take cognizance of the fact that in bargaining for collective agreement, parties are often driven, for one reason or another, to adopt rigid or intransigent positions. In such circumstances, the conciliator will have to utilize all the diplomatic skills at his disposal to break the resultant stalemate. His capacity to persuade the parties to move from entrenched positions and to compromise their differences will, in a large measure, depend upon their willingness to communicate freely to him explanations and information concerning the matters which induce or compel them to adopt their respective positions and what compromises or alternatives they might or might not be persuaded to accept in lieu thereof and in what circumstances....it cannot be doubted that much of the explanations and information itself contained in these communications...will originate only in the confidence that the contents of the conversations themselves will not later be disclosed to the other party. It seems to us that the element of confidentiality is indispensable to the inception and maintenance of any satisfactory or effective conciliatory relationship between the conciliator and the parties. It is not unreasonable to expect, therefore, subject to any exceptional and compelling reasons to the contrary which may exist in the particular case, that the mandatory and indiscriminate disclosure of these private and confidential communications would probably result in seriously undermining and damaging the relationship and the conciliation process as a whole. The resultant detriment to the labour relations community and to the public at large which would be occasioned by such disclosure, would likely eclipse and outweigh any near-sighted benefit to be gained to the party seeking their disclosure for the immediate purposes of a particular case.

The *Trenton Memorial Hospital* case involved an application for consent to prosecute the respondent employer for its alleged failure to bargain in good faith. It decided, prior to the enactment of the predecessor provisions of subsections (2) to (5) of section 111, that the Board would not compel the testimony of the chairman of a conciliation board and, further, that evidence of private communications between either party to the conciliation process and any member of the conciliation board were confidential and would be treated by the Board as inadmissible. Although the Act has since been amended to provide the same result, the decision is important in its demonstration that these results can be derived from basic principles. (See also *4 Way Wholesale Ltd.*, [1979] 3 Can. L.R.B.R. 295 (Alta), where the Alberta Board came to a similar conclusion despite the absence in its governing statute of provisions equivalent to subsections (2) through (5) of section 111 of the Ontario Act.)

13. Read literally, section 111(2) would exclude evidence of face to face bargaining conducted in the presence of a conciliation officer. The Board's decision in *Trenton Memorial Hospital* expressly left open the question whether the general principles there considered would require the exclusion of such evidence. That issue arose for consideration in *Gorman Eckert and Company Limited*, [1969] OLRB Rep. Dec. 1135, which also involved an application for consent to institute prosecution against an employer for its alleged refusal to bargain in good faith. The predecessor of section 111(2) had by then been enacted. The question for determination by the Board was whether it would admit a proposed collective agreement which had been submitted both to the union and to the conciliation officer in the course of the conciliation process. The Board concluded that what is now section 111(2) was intended to protect conversations of a private nature, but not conversations or matters of a non-private nature occurring in the presence of both parties. The proposed collective agreement, having been directly communicated by the employer to the trade union, was not by reason of its communication also to the conciliation officer a protected communication.

14. The Board reviewed the scope of subsection (2) of section 111 again in *C C H Canadian Limited*, [1974] OLRB Rep. June 375, where the trade union applicant applied for consent to prosecute the respondent employer for its alleged failure to bargain in good faith. The issue which arose there, and its resolution, are set out in the following passage from the decision in that case:

9. Mr. Cavalluzzo, through his witness Mr. H. Peacock, who was present at most of the negotiation sessions, wanted to adduce evidence of the course of negotiations through both conciliation and mediation. There was a strong implication that this involved the tendering of evidence about what the conciliation officer or mediator said to Mr. Peacock or what he said to the officers and a strict reading of section 100(2) would preclude any evidence of this kind. However, in *Bakery and Confectionary Workers' International Union of America, Local 415 and Gorman Eckert and Company Limited* OLRB M.R. December 1969, p.1135, the question arose as to whether a proposed collective agreement submitted by one party to the other during conciliation (it was submitted to the conciliation officer) was admissible in evidence. After extensively reviewing the case of *Building Service Employees' International Union, Local 183 and Trenton Memorial Hospital* 64 CLLC ¶16.302 which gave rise to the enactment of sections 100(2), 100(3), 100(4) and 100(5), the Board ruled that

“the purpose of Section 83(2) [now section 100(2)] was intended to protect those conversations of a private nature but that conversations or matters of a non-private nature are not protected by section 83(2) [now section 100(2)]”. Accordingly, the proposed collective agreement presented to the applicant and to the conciliation officer was found to be a non-private nature and properly admissible in evidence.

10. It must be recognized that neither section 14 nor section 100(2) can be read to the exclusion of the other. The Board must attempt to accommodate and integrate the purposes of each of these sections and only where there is an irreconcilable difference between them should the Board read the more specific wording of section 100(2) as overriding the values of section 14. It is believed that the *Gorman Eckert* decision follows such an admonition. The “private-non-private” distinction breaths meaning into the obligation to bargain in good faith during the conciliation and mediation processes while recognizing the fragile function of the conciliator or mediator – a function of integrity of which depends upon the confidentiality of private communications. This confidentiality was outlined by the Board in *Canadian Stackpole Ltd.* 59 CLLC ¶18,412 wherein the majority wrote at p.1778;

Although the extent to which an administrative board may rely on official notice has not been clearly defined, it would be preposterous to suppose that the members of this Board, constituted as it is, can fail to take cognizance of the fact that most successful conciliators have achieved their success by the use of manifold techniques among which are those of conferring separately with each of the parties and of meeting only with key principals and of the further fact that conciliators in this jurisdiction have from time to time relied on each of these last two mentioned methods of breaking down the barriers to the settlement of a dispute. It is common knowledge that skilled conciliators act as a channel of communication between the employer, on the one hand, and a senior official of the trade union, on the other, at time without a single employee even being aware that the conciliator is dealing with either of the “principals”. It would require clear and unequivocal language in the Act to convince us that it was the intention of the Legislature, in enacting the several provisions of the Act that are included under the heading “Negotiation of Collective Agreements”, to lay down that conciliation officers must desist from resorting to such techniques should they in their wisdom in any particular case deem it desirable to do so, except perhaps where the other party to the proceeding consents thereto. Similarly we cannot bring ourselves to believe that the Legislature in enacting the sections referred to, intended to deny to conciliation boards freedom to resort to tested and time-honoured methods of reconciling the parties to an industrial dispute, as they have done so in this jurisdiction time without number in the past.

Accordingly, private communications – communications with the conciliator or mediator when the parties are not in presence of each other – must have the protection of section 100(2). This is so because the mediator or conciliator must be able to discover a party's true "resistance point" [see; *Stevens, Strategy and Collective Bargaining Negotiations* (1963) p.122 and *Simkin, Mediation* (1973)] and to do so a party must be assured [sic] that the confidentiality of such communications is inviolable. However public statements – statements made while the parties are in each others presence – if admissible in evidence do not undermine the integrity of the conciliator's or mediator's function and hence are not precluded by section 100(2).

11. Applying these principles to the facts at hand, the Board was prepared to permit Mr. Peacock to give his opinion that at the conclusion of the conciliation and mediation processes the parties were little closer to reaching an agreement but the Board was not prepared to allow him to elaborate on this opinion if it entailed the description of communications he had had with the mediator or conciliator while out of the presence of the company's negotiators. Such communications would be clearly of a private nature.

12. Finally, Mr. Cavalluzzo argued that section 100(2) should be analogized to the privilege of solicitor and client. In other words, he suggested that section 100(2) was a privilege of the parties before the Board and therefore could be waived by any one of the parties. The Board rejected this contention. Section 100(2) is intended to protect the integrity of the conciliator's or mediator's office – it is not a privilege of the parties. If one of the parties could waive the application of section 100(2) and reveal the communications between it and a conciliator for instance, the effectiveness of this official could be seriously impaired. He may have tempered the comments received from the parties or made projections that were based on his own informed but personal speculation. Such revelations would only undermine the usefulness of such offices.

15. The Board's approach to these questions has always recognized that the primary function of a conciliation officer or mediator is not to act as a postman, courier or telegraph service. He is not the agent of either party for the delivery or receipt of messages to and from the other. The officer has no duty to repeat to one party everything he is told by the other. Indeed, as the above-quoted passages demonstrate, he attempts to have the parties disclose to him things that they do not wish disclosed to the opposite party. Each party is aware that this occurs. This adds to the effectiveness of the officer's private communications are often carefully crafted so as to blur the line between speculation and revelation. Of course, conciliation officers do convey those positions and changes of position which either party wishes conveyed. Even these communications, however, take place within a context of confidential discussion of the nature sought to be protected both by the principles outlined in *Trenton Memorial Hospital* and the express provisions of section 111 of the Act, and are ordinarily inseparable from the context when they occur in the absence of the party from which they originate.

16. Accordingly, we do not accept the argument that testimony concerning one party's private conversations with a conciliation officer or mediator should be accepted in evidence as prima facie proof of what must have taken place between the mediator or conciliation officer and the opposite party. Apart from the doubtful logic and, in the case of statements by the mediator, the hearsay dangers involved in that approach, its adoption would completely undermine the confidentiality of such private conversations. One party's revelations would force the other party to reveal his version of what he said to the mediator. Both parties would then clamour for permission to call the mediator to resolve the inevitable inconsistencies. Even on a question (if relevant) of the party's mental state, any inference that might be drawn from the party's version of his conversations with the mediator is no more trustworthy than his direct statement of what he was thinking at the time, since the other participant in the alleged conversation is not a compellable witness. Reference to the conversation, therefore, adds nothing but further adverse pressure on the confidentiality, and thence the efficacy, of the conciliation process.

17. We have reviewed the reported decisions in *The Ottawa Journal case*, supra. Only one passage suggests that the Board there entertained any evidence of discussions which occurred between a "mediator" and one party in the absence of the other. That appears at paragraph 38 of the Board's first decision at [1977] OLRB Rep. June 309, at p.318:

38. The parties then met with Ray Illing, a Ministry of Labour mediator. The meetings commenced on April 1st, and continued through the weekend. On Saturday, *The Journal, through the mediator, presented a proposal* in respect of the Joint Council. The proposal dealt with a number of proposals relating to the terms and conditions of employment of the pressmen, stereotypers, and mailers, and also a proposal referring to a "damage and good conduct clause and orderly return to work clause". At the mediator's request, The Journal provided a clarification of this latter matter on the next day. This clarification referred to specified damage to vehicles, property, and newspapers, and the reservation of the right to claim damages resulting from the union boycotts. On that same day, *The Journal presented, through the mediator, its proposal* for the Guild contract. Then, on Tuesday, April 5th, The Journal presented its proposal for the Ottawa Typographical Union contract. These two proposals also contained a proposal concerning damage, good conduct, and orderly return to work. The Unions apparently regarded the first two proposals as being bargainable, but regarded the proposal for the Ottawa Typographical Union as being completely unacceptable, primarily because, in addition to not-giving any concession on jurisdiction, it provided no job guarantees at all.

[emphasis added]

It is not clear how these facts were established in evidence. They might have been agreed facts. If they were, their admission would not have offended the principles established in the Board decisions reviewed in this decision. While we do not know from the *Ottawa Journal* decision how the parties established the facts recited in the passage quoted above, we do know there is no discussion of their admissibility of section 111 of the Act or of the underlying principles reviewed in the Board's previous jurisprudence. Any intended departure from that

jurisprudence would, we believe, have been the subject of express comment by the Board. We do not, therefore, take that case as confirming or announcing a policy inconsistent with that jurisprudence.

18. In the result, we adopt the approach taken by the Board in *C C H Canadian Limited, supra*. We will not entertain evidence from either party as to what was discussed between its representative and a conciliator or mediator in the absence of the other party where, as here, the other party objects to the introduction of that evidence. We will give no weight to any evidence of that sort which may have been received up to this point.

19. Evidence of direct communications between the parties is not, of course, affected by this ruling. That is the answer to any concern that the Board's approach hinders enforcement of the duty to bargain in good faith. The course of negotiations can be charted by evidence of direct communications undertaken from time to time to confirm or obtain confirmation of changes in position. Each party, therefore, has the means to ensure that the confidentiality of the conciliation process is not used as a cloak for bad faith bargaining.

0171-83-JD The Printing and Graphic Communications Union (Newspaper Local N-1), Complainant, v. Graphic Arts International Union (Local 211) and Southam Printing Limited (Southam-Murray Division), Respondents

Jurisdictional Dispute – Dispute as to assignment of work operating off-set press – Board's usual criteria favouring respondent union – Potential loss of job for complainant union's members not causing Board to assign work to complainant

BEFORE: Kevin M. Burkett, Alternate Chairman and Board Members J. Wilson and E. G. Theobald.

APPEARANCES: Sheila R. Block, Barbara J. Greenwood, Paul D. Blundy, Don Oliver and Bob Watson for the complainant; J. J. Nyman, M. Zajac for the respondent union; R. Ross Dunsmore, Craig Slater, John Derosa and Angela Arkel for the respondent company.

DECISION OF THE BOARD; January 9, 1984

1. This is a jurisdictional dispute complaint filed under section 91 of the *Labour Relations Act* by the Printing and Graphic Communications Union (hereinafter referred to as Local N-1). The complainant seeks the assignment of its members to work on a Harris N-900 web offset press which the company was about to install at its Weston Road plant at the time of the filing of this complaint and which has since been installed. The manning of this Harris N-900 press has been assigned to members of the Graphic Arts International Union (hereinafter referred to as Local 211). Three teams of five men each (1st pressman, 2nd pressman, 3rd pressman, rollman and jogger) have been selected to operate the press.

2. The parties to the matter agreed on a number of statements of fact which, exclusive of the appendices, are set out below:

[Statements describing work in dispute, other presses of the company and the bargaining history and provisions of the collective agreements of the two unions omitted.]

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4. The constitution of the recently merged Graphic Arts International Union and the International Printing and Graphic Communications Union provides:

All parts or sections of a newspaper whether they be called music supplements, magazine or color sections, shall be considered to form a part and parcel of the work belonging to the newspaper craft when done on newspaper web presses and no technicality in reference to whether the same shall be done from a hard or soft packing, shall act as a waiver of the rights of the newspaper pressmen's union, and the pressmen holding positions on newspaper web presses producing magazines, comic or colored supplements to newspapers, shall transfer their membership to the newspaper pressmen's union under whose jurisdiction they are working; provided, that all work referred to in this Section is done on newspaper web presses.

The evidence is that this provision was taken from the constitution of the former International Printing and Graphic Communications Union (I.P. & G.U.C.) and that the I.P. & G.U.C. divisions referred to in the clause continue to exist. Mr. Ron Tozzi, the Canadian International Vice-President of the merged unions, when asked in cross-examination if the arrangements set out in the above clause pertained to disputes arising among divisions of the former I.P. & G.U.C., replied in the affirmative. However, when asked in re-examination if, following the merger, it was conceivable that these procedures are intended to deal with disputes between locals of the entire merged union, he also replied in the affirmative.

5. Mr. Don Oliver, the president of Local N-1 since January, 1980, testified. Local N-1 is a newspaper local with the singular exception of the rotogravure unit at Southam Murray. It is his evidence that all of the Local N-1 members working at Southam Murray are familiar with web presses and would require only two weeks of training to operate the Harris N-900. He testified that 90% of the experience on rotogravure is applicable to offset with the difference being the water process versus the chemical process. He referred to the union training programme and to the smooth transition to offset by members of Local N-1 at the Daily Racing Form and the Brampton Times as well as the move to offset by the Toronto Sun (a non-union operation). He admitted in cross-examination that there is nothing in the union training manuals that applies to offset printing. In explaining why Local N-1 had never claimed offset work at Southam Murray in the past, Mr. Oliver testified that until 1980 it had been shared by Local 10 (a sister local decertified in 1980) and Local 211. When asked why Local N-1 did not assert a claim to the second Baker Gurney offset press that was installed in 1981, Mr. Oliver testified that Local N-1 was entering into contract negotiations at the time and was told not to pursue the matter by the Council of Printing Industry spokesman who was representing the company. The evidence is that Local N-1 suffered significant layoffs following the loss of the Eaton's catalogue business in 1977 and was below 50 members, from a high of about 100 members, in 1981. Mr. Oliver testified that when he approached the company concerning the assignments to the Harris N-900 he was advised by Mr. Chase, a senior management official, that the company would prefer to make the assignment to Local N-1 because

of their excellent work and because under the N-1 agreement the machine could run through lunch breaks. It is Mr. Oliver's evidence that Mr. Chase stated that he feared vandalism by members of Local 211 if the assignment was made to Local N-1.

6. Mr. John Derosa, the company's manager of printing production, was called to testify. It is his evidence that in making the assignment that it did the overriding criterion was offset experience. He testified that offset experience is critical because under the offset process the water is constantly attacking both the ink and the paper. If there is too much water, emulsification results and if too little water, piling results. In addition, the offset operator is responsible for regulating the supply of ink to the rollers and for obtaining the proper colour. While many of the facets of offset printing and rotogravure printing are similar, it is Mr. Derosa's evidence that it would require six months for the best rotogravure operator to learn the offset process and one year for an average rotogravure operator to learn the offset process. In his opinion the company's offset pressmen were more qualified. He referred to the offset printing at the Daily Racing Form and the Brampton Times as not very sophisticated and testified that if that type of work was being done at Southam Murray it would be assigned to an apprentice working on a single colour press. The company, after making an agreement with Local 211 by which the Harris N-900 would run continuously, assigned the work to its members.

7. Mr. Mike Zajac, the executive vice-president of Local 211 for the past five years, testified. It is his evidence that Local 211 has several hundred members who work as offset pressmen within its geographic jurisdiction. He produced a list of web offset presses operated by Local 211 members which is reproduced below:

[List of presses omitted]

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Local 211 runs a school in Toronto (one of six in Canada) with a \$200,000 annual budget. The school employs 31 instructors and houses over \$1 million worth of equipment. Although the school does not have a Harris N-900 press, it provides extensive, hands-on instruction in the offset process with complete lessons on dampening, inking and the packing and interchange of plates. Mr. Zajac referred to the long-standing recognition clause in the Local 211 collective agreement and testified that Local 211 has never before, prior to this matter, been challenged by Local N-1 in respect of its jurisdiction to operate web offset presses at Southam Murray. He explained that in 1980 Local 211, which represents over 100 persons at Southam Murray, was approached by some of the 20 persons represented by Local 10 and decertification proceedings ensued.

8. Mr. Bill McGibbon, a former member of Local N-1 who worked as a pressman in the rotogravure room for 15 years before being laid off in 1978, testified. He was rehired as a rolltender to work on the first Baker Perkins in 1978. He has only just advanced to a third pressman and testified that he was not qualified at the time, nor is he qualified now, to be a first pressman. It is his evidence that six months to one year would be required to become a third pressman and longer to be proficient. When asked what aspects of the offset process cause difficulty he replied, water, etching and plates to blankets. There is no dampening nor blankets used in rotogravure.

9. The complainant Local N-1 submits that the primary factor to be considered by the

Board in this matter is the loss of jobs to employees with 22 to 40 years' service with the company that will occur if the company's assignment to Local 211 is upheld. The complainant maintains that the recognition clause in its collective agreement, which is not restricted to rotogravure, is broad enough to encompass the work. Local N-1 argues that where there has been a *de facto* agreement between itself and a sister local with respect to the work in dispute, and where Local N-1 raised the question of its jurisdiction over the work in 1981 (the only time that a claim could have been made following the decertification of Local 10) and did not withdraw its claim in a way that would allow the company to argue that it is estopped from doing so now, the recognition clause must be read as giving it a legitimate claim to the work in dispute. Local N-1 also relies on the provisions of the new International constitution which have been set out at paragraph 4 herein. Local N-1 maintains that in the face of only one prior assignment to a web offset press having been made by the company since the decertification of Local 10 there is no persuasive employer practice and in the absence of any Harris N-900 presses in operation in any shop in this area there is no area or industry practice upon which the Board can rely. Local N-1, on the basis of the uncontradicted evidence of Mr. Oliver that Mr. Chase preferred Local N-1 on the basis of efficiency and economy but feared sabotage if it made assignment to Local N-1, asks the Board to find that the real preference of the employer was to assign the work to Local N-1. Local N-1 asks the Board to discount the evidence of Mr. Derosa, who is not a rotogravure pressman, and Mr. McGibbon, who it maintains is a "backend" person, and find that the members of Local N-1 have the skills necessary to perform the work. Local N-1 maintains that it has the better waste and safety records and advises the Board that, given the work assignment, would negotiate competitive rates. Local N-1 asks the Board not to be overly influenced by the training facilities of Local 211 but to focus on the fact that only 50 hours of training are devoted to the offset process at the Local 211 school and that there is no Harris N-900 press at the Local 211 school. In light of these factors and in the light of the potential job loss to Local N-1, Local N-1 asks the Board to award the work in dispute to it. At the very least, Local N-1 asks the Board to follow the approach taken in *Boise Cascade Ltd.* [1982] OLRB Rep. July 981 and make an order splitting the work, which, in its view, is appropriate where the two competing locals are now part of the same international union.

10. In making its decision the company asks the Board to find that Local 211 has had a shared jurisdiction over offset printing since 1969 and an exclusive jurisdiction since 1980. The company asks the Board to further find that Local N-1 has had jurisdiction over roll and sheet fed rotogravure only and was never party to the agreements between Local 211 and Local 10 with respect to the sharing of jurisdiction over offset. The company asks the Board to read the recognition clause of the Local N-1 collective agreement in the context of the agreement as a whole where numerous references are made to rotogravure and to conclude that the jurisdiction of Local N-1, as set out in its collective agreement, is limited to rotogravure. The company points to the work assignments made to Local 211 members on its two Baker Gurney offset presses in support of its position that employer practice favours Local 211. The company argues that the number of high speed offset presses operated in this area by members of Local 211, as compared to the offset presses operated by members of Local N-1 at the Daily Racing Form and the Brampton Times, weigh heavily in favour of Local 211 under the heading of area or industry practice. The company argues further that when the evidence with respect to the difficulty in maintaining proper ink and water balance in the offset process and the fact that water and blankets are not used in the rotogravure process are taken into account, a distinct advantage, under the skill heading goes to the members of Local 211 who have extensive offset experience. Finally, the company argues that Mr. Derosa was responsible for

making the assignment and having regard to the cost of training and the competitive need to get into production quickly, preferred Local 211. The company maintains that on an application of the factors which are usually applied by the Board in these matters there should be no hesitation in upholding the assignment to Local 211. In the absence of any agreement to share the work, as there was in the *Boise Cascade* case *supra*, the company asks us to reject the proposal of Local N-1 to share the work, as unworkable.

11. Local 211 adopts the submissions of the employer and, in addition, argues that if Local N-1 was making the claim which it is at arbitration, an arbitrator, with reference to the Local N-1 collective agreement and its historical lack of offset jurisdiction, would dismiss its claim. Local 211 asserts that Local N-1 should not be in any better position because the work in dispute has been assigned to the members of another union. Local 211 also argues that in assessing the impact upon Local N-1 of the assignment of this work to Local 211, the Board must be mindful of the fact that Local 211 negotiated collective agreement provisions which allow it to fund a school for the purpose of instructing its members in the latest technology. In contrast to the education of its members carried on by Local 211, Local 211 asks the Board to consider the failure of Local N-1 to assert its jurisdiction to establish a school or to negotiate amendments to its scope clause and to conclude, notwithstanding the possible loss of some Local N-1 jobs, that the equities are in favour of awarding the work to the union that has the stronger claim and has prepared its members to perform it. In the absence of any effort having been made to utilize the new constitution (which Local 211 maintains is not clear in any event), Local 211 argues that Local N-1 should not be permitted to rely on it. In conclusion, Local 211 maintains that the work must be awarded to it on an application of the traditional factors and on consideration of the collective bargaining history and the current collective agreements.

12. Local N-1 argues firstly in reply that there is no evidence that it did not attempt to rely on the new constitution. Local N-1 argues secondly in reply that its collective agreement, wherein only two items of work in its jurisdiction clause are restricted to rotogravure, is clearly applicable. Local N-1 reiterates that it made a claim for the work at the first opportunity following the decertification of Local 10 and should not be characterized as sitting on its hands. Local N-1 also reiterates that in the absence of any Harris N-900 presses in the shops in which Local 211 members work, area practice does not assist Local 211. Local N-1, citing the work done by its members elsewhere, argues that the skills possessed by its members are transferable to the Harris N-900 web offset press. Local N-1 maintains that its members have an eye for colour, know how to put ink to paper and have had a great deal of experience on web presses with the result that the assignment should be made to Local N-1.

13. A synopsis of the factors taken into account by the Board and the emphasis that is given by the Board to the necessary skills is contained at paras. 18 and 19 of the *Toronto Star Newspapers Limited*, (1980) OLRB Rep. Apr. 565 as follows:

18. In assessing the merits of jurisdictional disputes in the construction industry, the Board has looked to 1) collective bargaining relationships, 2) skill and training, 3) consideration of economics and efficiency, 4) the employer's practice and 5) area practice. (See *Anchor Shoring Limited* [1974] OLRB Rep. Aug. 528, *Urban Consolidated Construction Corporation Ltd.* [1977] OLRB Rep. Feb. 41). In *Kingston-Whig Standard Company Limited* [1972] OLRB Rep. Nov. 959 the Board was asked to

rule on a jurisdictional dispute between the photoengravers and the I.T.U. The paper had moved from a "hot metal" to a "cold metal" process and the dispute was in respect of the plate-making function. There were no stereotypers at the paper. In that case the Board considered 1) area and industry practice, 2) job loss, 3) collective agreements, 4) availability of craftsmen and skills, 5) awards, 6) employer preference. While each case must be decided on its own merits the factors referred to above and those used by the Board in construction industry disputes are useful guidelines to be used in assessing the merits of any jurisdictional dispute.

19. We accept the conclusion reached in both *Pacific Press*, [a decision of the British Columbia Labour Relations Board dated May 26, 1977] and *La Presse*, [a decision of the Quebec Labour Court Sitting in appeal (No. 500-28-00197-7727)] that the Board must look to the nature of the work done by the employees and not the use made by the employer of the end product of the work in dispute. If the end product was to be cast as a primary criterion the result would be to downgrade the importance of skills and ability, and efficiency, as primary criteria. Clearly the skills associated with performing a work process and the efficiency with which it is performed are inter-related factors. A craft union is one whose members "are distinguishable from the other employees and commonly bargain separately and apart from other employees through a trade union that according to established trade union practice pertains to such skills or craft." When called upon to resolve competing work claims between craft unions the Board must look to the work and determine if the skills of one of the crafts are more closely related to the nature of the work in dispute and whether or not the use of these skills by persons trained in the craft will have a bearing on efficiency and economy. If we were to restrict ourselves to the end product these considerations, which must be central to the resolution of any jurisdictional dispute, would become irrelevant.

14. Offset printing involves a different process than rotogravure or the other types of printing referred to in the agreed statement of fact. The offset process requires as a precondition to the efficient operation of a sophisticated offset press, a knowledge and understanding of the interaction of water and ink and the balancing of the two. Local N-1 has not established that its members possess this skill (an almost fatal shortcoming) and, in dealing with the factors of employer practice and industry and area practice have ignored the skills component by focusing on the Harris N-900 as simply a machine rather than as a sophisticated offset printing press.

15. When reference is had to the evidence of Mr. Derosa and Mr. McGibbon we are forced to conclude that the period of time required to make a good rotogravure pressman proficient as a first or second man on a large offset press would be measured in months rather than weeks. Notwithstanding the changeovers that have occurred at the Brampton Times and the Daily Racing Form, we are not satisfied on the evidence that members of Local 211 could operate the Harris N-900 efficiently if assigned to it. Members of Local N-1 may be very efficient when operating rotogravure presses but without the necessary skills in offset it cannot be reasonably argued that they could perform offset work as efficiently as those who have

considerable experience on offset. They would require extensive training while crews composed of members of Local 211 have been assigned without the need for extensive training.

16. If we again focus on the process it can be seen that the factors of employer practice and industry and area practice weigh in favour of Local 211. Although Southam Murray has not, prior to installing the Harris N-900 with which we are concerned, assigned work on that machine it has been performing offset work since 1969 and throughout the period 1969 to the present members of Local 211 have been performing that work. The two Baker Gurney presses in place at the employer's premises are comparable presses to the Harris N-900 and these are manned by members of Local 211. Furthermore, the list of web offset presses manned by members of Local 211 as set out at paragraph 7 herein are comparable presses to the Harris N-900 and a great deal more sophisticated than the single colour offset presses operated at the Brampton Times and the Daily Racing Form. When reference is had to the process, therefore, the factor of area practice must also be decided in favour of Local 211.

17. In addition to the foregoing, the claim of Local 211 is buttressed if we look to the respective collective agreements and to the historical work jurisdiction of the two competing unions. Jurisdiction over the work in question is expressly provided in the Local 211 collective agreement. The provision for the work is not surprising in light of the fact that members of Local 211 have been performing it since 1969 and have been performing it exclusively since the decertification of Local 10 in 1980. When we read the Local N-1 collective agreement in its entirety we are forced to interpret the recognition clause as limiting the scope of Local N-1's jurisdiction to rotogravure work. We come to this conclusion notwithstanding the expressly unrestricted reference to pressmen's work in article 4.01 of that agreement. This result is also not surprising given the fact that Local N-1 has never asserted a claim to offset work prior to launching this complaint and no member of Local N-1 has ever performed offset work for Southam Murray. Local 211 has a claim to the work in question that can be referenced to its collective agreement while Local N-1 cannot rely on its collective agreement in support of its claim to this work.

18. While there is some confusion as to the initial preference of the employer, there can be no doubt on the evidence of Mr. Derosa that the preference of the employer, as evidenced by the assignment it has made, is in favour of Local 211. Whatever weight might be given to the evidence of Mr. Oliver that he was told by the company that it feared that it would be the victim of sabotage if it assigned the work to Local N-1 is overshadowed by the evidence pertaining to the skills of the Local 211 members on the offset process and the collective agreement which the employer has entered into with Local 211. This latter evidence lends substance to the assertion of Mr. Derosa that the true wish of the company was to have the work performed by members of Local 211.

19. In the absence of any evidence that Local N-1 has attempted to avail itself of the constitution of the International union we are not prepared to give that document any weight in deciding the matter before us.

20. We now turn to the question of job loss. If the work in question is awarded to Local 211 and if the present shift away from rotogravure continues, there will be further job losses by members of Local N-1. The question for the Board is whether it should now protect the jobs of the Local N-1 members in circumstances where, on a consideration of all of the other relevant factors, the work in dispute should be awarded to members of Local 211. The

Board has made it clear in a number of cases that although the *Labour Relations Act* accords a special status to craft bargaining units, it does not guarantee their continued preservation when the craft basis for them has been eroded. (See *Re Joseph Brant Memorial Hospital*, [1981] OLRB Rep. Nov. 1598, *Boise Cascade Canada Ltd.* [1983] OLRB Rep. Feb. 194.) We do not accept that Local N-1 can somehow claim a shared jurisdiction on the basis of the shared jurisdiction which existed between Local L-10 and Local 211. Local N-1 has never asserted its claim to offset printing work and when reference is made to the weighing of the relevant factors discussed in the preceding paragraphs and to the steps taken by Local 211 to prepare its members to work as offset pressmen we must conclude that the potential job loss is not sufficient to sway the balance.

21. Having regard to all of the foregoing, we hereby exercise our discretion under section 91 of the Act and confirm the assignment of work on the Harris N-900 press to members of Local 211 as made by the employer.

2055-83-R Canadian Union of Public Employees, Applicant, v. **Sudbury Hospital Services Limited**, Respondent, v. International Union of Operating Engineers, Local 796, Intervener

Bargaining Unit – Raiding union required to take existing unit on same terms as represented by incumbent – Incumbent having single collective agreement – Whether agreement included employees in one unit or separate full and part-time units

BEFORE: Owen V. Gray, Vice-Chairman and Board Members W. H. Wightman and B. L. Armstrong.

APPEARANCES: *Jim Anderson and Jack Bird for the applicant; K. R. Valin, E. H. James and Lloyd Harris for the respondent; John Sullivan, Dianne Robertson and Joan*

St. Jean for the intervener.

DECISION OF THE BOARD; January 9, 1984

1. This is an application for certification. The applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*. The employees for whom the applicant seeks exclusive bargaining rights are currently represented by the intervener.

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3. The applicant seeks certification for one bargaining unit consisting of all employees of the respondent. The respondent and intervener take the position that there are two bargaining units, one consisting of full-time employees and the other consisting of part-time employees and students employed in the school vacation period.

4. The Board's general practice in certification applications where an incumbent union

holds bargaining rights is to describe the bargaining unit in the same terms as the unit set forth in the most recent collective agreement between the employer and the incumbent union: *Gilbey Canada Limited* [1974] OLRB Rep. April 257; *Ontario Hydro* [1978] OLRB Rep. Aug. 754; *Milltronics Limited* [1980] OLRB Rep. Jan. 56; and *Bestview Holdings Limited* [1983] OLRB Rep. Feb. 185. The rationale for this is explained in *Milltronics Limited*, *supra*, at paragraph 6:

On an application for certification the Board is required to determine the unit of employees which is appropriate for collective bargaining. Where one trade union is seeking to displace another, however, the established bargaining structure is *prima facie* appropriate – particularly if it has been established by the parties themselves, through collective bargaining, and continued through the years over several collective agreements. Indeed, what better evidence of “appropriateness” could there be than a pre-existing bargaining structure which the parties have developed themselves and have adapted to their own bargaining circumstances. The Board has been reluctant to fragment an established bargaining structure or to “carve out” groups of employees from such structure. The Board will generally find the appropriate bargaining unit to be that which the incumbent presently represents; although, of course, in appropriate circumstances, a larger unit may also be appropriate and could be granted without raising any concern about fragmentation. Usually, however, a “raiding union” must “take” what the incumbent union has...

5. The parties to this application do not challenge this practice; they merely disagree on the correct result of its application. The applicant argued that the existing bargaining structure treated all employees as falling within one bargaining unit. The respondent and intervener argued that the existing structure and practice reflected a treatment of the full-time and part-time employees as distinct bargaining units. The existing structure and past history of bargaining were described to us in statements by counsel for the respondent and representatives of the intervener. All parties agreed we could take these assertions as proven without the necessity of hearing evidence. Those facts will now be set out.

6. On November 3, 1971, the intervener was certified for its customary craft unit of “engineers” employed by the respondent. On January 4, 1973, the intervener was certified to represent all full-time employees of the respondent, excluding part-time employees and employees covered by the subsisting agreement applicable to the craft unit. In 1975, the intervener organized the part-time employees, and indicated to the respondent that it had sufficient membership support among those employees to justify its voluntary recognition to represent them. The employer granted such recognition in 1975 during what was described as “concurrent negotiations” with respect to the craft unit and full-time unit.

7. The terms and conditions of employment of all employees of the respondent are now found in one document. The style on the cover page is:

COLLECTIVE AGREEMENT

BETWEEN

SUDBURY HOSPITAL SERVICES

AND

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL
#796

JANUARY 1, 1983 – DECEMBER 31, 1983

On its first page, the agreement is headed:

THIS AGREEMENT MADE THIS 1ST. DAY OF JANUARY 1983

BETWEEN

SUDBURY HOSPITAL SERVICES – GENERAL LAUNDRY

and

INTERNATIONAL UNION OF OPERATING ENGINEERS – LOCAL #796

The recognition clause reads as follows:

Sudbury Hospital Services recognizes the Union as the sole collective bargaining agent for all of its employees save and except foremen, those above the rank of foreman, office staff and those employees included in the subsisting Collective Agreement covering Engineers.

8. The parties agree that there was not a “subsisting Collective Agreement covering the Engineers” when the current collective agreement was signed. We are told there has been no “subsisting collective agreement covering the engineers” since at least 1980; since then, the terms and conditions of employment of all employees have been found in one document. There is no suggestion that the terms and conditions of employment of the part-time employees have ever been the subject of a separate, self-contained document.

9. So far as anyone present at the hearing could recall, since 1975 the terms and conditions of full-time or part-time employees had not been negotiated separately. There would be one set of negotiations. The incumbent trade union had only one bargaining committee during negotiations. Membership on this committee usually included both full-time and part-time employees. No one present was able to advise us how issues arising in that committee had been dealt with procedurally and, particularly, whether the part-time members had a say with respect to full-time issues or vice versa. One of the employee representatives of the incumbent had been in attendance at the ratification vote held at the conclusion of the last set of negotiations prior to the coming into force of the *Inflation Restraint Act*. She was able to advise us that both full-time and part-time employees attended that meeting. There was only

one vote and one ballot box. The respondent claimed no knowledge of the ratification procedure employed in the past by the intervener. The business agent present and representing the intervener, while personally unfamiliar with the conduct of the bargaining committees and ratification votes in past negotiations with this employer, did say it was not uncommon for his union to conduct separate ratification votes where two or more bargaining units are involved.

10. The recognition clause reproduced above is suggestive of a single bargaining unit. Counsel for the respondent, however, urges us to find two separate bargaining units covered by one document, having regard to the separate different treatment of part-time employees under the collective agreement. Counsel drew our attention to article 7 of the agreement, which provides:

A part-time employee is an employee who is normally employed for not more than twenty-four (24) hours per week. The working conditions of part-time employees are set out in Schedule "A" attached hereto.

Schedule "A" is entitled "Part-Time Employees", and begins with the following sentence:

The following Articles in this Agreements shall apply to part-time employees:

There follows a long list of article numbers from which, curiously, article 7 is omitted. The other omissions are articles dealing with seniority, hours of work, vacations, various kinds of leave, (adoption, bereavement, leave without pay, duty and witness duty, permission to leave and sick leave), health and welfare benefits and a boilerplate interpretation clause dealing with the interpretation of the masculine or feminine gender wherever it appears in the agreement. Schedule "A" goes on to provide that the articles set out thereafter apply only to part-time employees. Those articles cover seniority, probation, transfers, hours of work, vacations, pay in lieu of fringe benefits and shift exchange privileges.

11. Counsel for the respondent argued that this different treatment of part-time employees, and particularly the maintenance of separate seniority lists for full-time and part-time employees, justified a finding that this is a document covering two separate and distinct bargaining units. Counsel expressed the concern that a finding that full-time and part-time employees fall within one bargaining unit would oblige the respondent to treat such employees equally in all respects in future negotiations. This, he argued, would alter the status quo. Only a finding that there are two units would, he said, permit the respondent to maintain a status quo in which the two types of employees are treated differently. We did not find those arguments persuasive. It is not uncommon for the parties to a collective agreement covering one bargaining unit to maintain different seniority lists for different employees and to otherwise treat various categories of employees differently. With respect to seniority lists, these may be maintained on a plant, departmental, classification or even job basis, and on more than one basis for more than one purpose. That the parties to a collective agreement choose to do so is in no way indicative of an intention to treat the employees on each list as constituting a separate bargaining unit. The different treatment in a collective agreement of different categories of employees is not, as counsel for the respondent suggested it might be, a per se violation of the *Labour Relations Act* by either the employer or the trade union.

12. Nothing in the language of the collective agreement unequivocally suggests an intention to treat full-time employees and part-time employees as two separate bargaining units. Schedule "A" does refer, under "probationary employees" to "part-time employees transferred from full-time unit", but five lines later on the same page, the schedule provides:

The option to transfer to and from the full-time group, to and from the part-time group shall be on a voluntary basis.

Article 5 in the body of the agreement, which does not cover part-timers, refers to the hiring of employees "from outside the bargaining unit". Articles 4 and 14, which apply to both full-time and part-time employees, read, in part, as follows:

ARTICLE 4 – UNION SECURITY

All employees in the *bargaining unit* shall, when they have completed their probationary period, be required to pay an amount equal to the current monthly dues to the Union whether they become members or the Union or not so long as the Union is the recognized collective agent of the *bargaining unit*...

ARTICLE 14 – WORK DONE BY SUPERVISORS;

Employees who are not in the *bargaining unit* will not perform duties normally done by those employees who are covered by this Agreement, except for the purposes of instruction, experimenting or in emergencies when regular employees are not available, or to the extent that *bargaining unit employees* are deprived of working normal hours or deprived of overtime work assignments.

(emphasis added)

13. The repeated use of the phrase "the bargaining unit" in the singular suggests a common intention to treat all employees as being part of one unit. Nothing in the heading to or manner of execution of the agreement suggests otherwise (in contrast to, for example, the situation in *Ontario Hydro, supra*). The little the parties could tell us about the intervener's approach to past negotiations is consistent with full-time and part-time employees being seen to fall together in one unit. The allegedly separate units are not separately treated in the recognition clause. In short, there is in the facts of this case nothing to support defining the bargaining unit otherwise than in the terms used in the existing collective agreement, except the unanimous agreement of the parties that the anachronistic reference to a subsisting agreement covering engineers should be deleted.

14. Accordingly, at the hearing in this matter, the Board ruled orally as follows:

For reasons to be delivered later, and having considered the submissions of the parties, we are unanimously of the view that there is one appropriate bargaining unit for the purpose of this application, defined as follows:

All employees of the respondent save and except foremen, those above the rank of foreman and office staff.

We hereby affirm that ruling, for the reasons set out in this decision.

15. December 12, 1983, the terminal date fixed for this application, is the date which the Board has determined under section 103(2)(j) to be the time for ascertaining membership under section 7(1) for the purpose of this application. Based on all of the evidence before it, the Board is satisfied that, as of that date, more than fifty-five per cent of the employees in the appropriate bargaining unit were members of the applicant trade union. As this is a displacement certification application, the Board exercised its discretion under section 7(2) of the Act and ruled orally at the hearing that a representation vote be taken and appointed N. Harper, Labour Relations Officer, to confer with the parties with respect to arrangements for the vote. The Board hereby confirms those rulings.

16. A representation vote will be taken of the employees of the respondent in the bargaining unit. All employees of the respondent in the bargaining unit whose names appear on the voters' list at December 22, 1983 as agreed to between the parties, who do not voluntarily terminate their employment or who are not discharged for cause between December 22, 1983 and the date the vote is taken, will be eligible to vote.

17. Voters will be asked to indicate whether they wish to be represented by the applicant or intervener in their employment relations with the respondent.

18. The matter is referred to the Registrar.

1550-83-U Vazken Kaljian, Complainant, v. Canadian Union of Public Employees, Local 1996, Respondent, v. Toronto Public Library Board, Intervener

Duty of Fair Representation – Practice and Procedure – Unfair Labour Practice – Nine month delay in filing of complaint – No evidence of prejudice to respondent – Board not declining to entertain complaint

BEFORE: Corinne F. Murray, Vice-Chairman.

APPEARANCES: *J. Paul Wearing (Dec. 5/83), Mark Topp (Nov. 8/83) and Vazken Kaljian for the complainant; Howard Goldblatt, Jack White and Mary Cook for the respondent; Edward T. McDermott, T. Town and Margaret Kretan for the intervener.*

DECISION OF THE BOARD; January 12, 1984

1. The name of the respondent is amended to read: "Canadian Union of Public Employees, Local 1996".

2. This is a complaint pursuant to section 89 of the *Labour Relations Act* wherein the

complainant alleges that he was dealt with by the executive and members of C.U.P.E. Local 1996 contrary to section 68 of the Act. The complaint is dated September 30, 1983 but was not delivered to the Board until October 11, 1983. The particulars alleged in support of this complaint relate to events from March 30, 1982 up to and including January 16, 1983:

The Complainant was discharged from his employment as librarian with the Toronto Public Library System on November 16, 1982. The complainant disputes the reasons given for his dismissal, but has been unable to obtain a grievance hearing to review the dismissal. The Complainant submits that no arbitration procedure was initiated in part because the bargaining unit included supervisors carrying out management functions, whose reports were the sole basis for his dismissal, and such supervisory personnel were present, voted, and unduly influenced other members present at the Union meeting where the decision respecting the grievance was made.

The background to the dismissal and the Union action began on March 30, 1982. At that time the complainant had been employed for five years by the library system, and had always been a satisfactory employee and received positive evaluations (record of which was to subsequently disappear from the complainant's personnel file and which the supervisor would refuse to remember existed).

On March 30, the Complainant was told to attend a meeting April 2nd, with Ms. Nancy Heighton, who supervised the administration of several local library branches, Ms. Maureen McPhee, senior union stewardess, and Maria Czerniakowsky (C). C was the Complainant's immediate supervisor and was at all times in charge of the Pape-Danforth branch of the library.

Based on a report by C (of which the Complainant had no previous knowledge or indication, and the substance of which the Complainant strongly denies) Ms. Heighton informed the Complainant that management would be advised to place him on three months probation in order to re-evaluate his performance. The Complainant objected to the report and the reasons given for the probation, and asked Ms. McPhee, whose specific purpose in attending was to protect his rights, what recourses were open to him. He was advised at that time that it was "very difficult", that the Complainant had "no choice" and that "they" (Ms. Heighton and C) "were not doing anything illegal", and that he should keep quiet. The Complainant accepted this advice with the understanding that the Union could only help him in a limited manner.

It is noteworthy that both C, whose report was the sole basis of the action taken, and Ms. Heighton, who actually requested that he be placed on probation, were both Union members, and members of the same bargaining unit as the Complainant and Ms. McPhee. As supervisors, they were in positions of authority and exercised management functions in respect to the majority of members of the Union Local.

The terms of the probation placed the Applicant again under the supervision of C and a few staff members, including non-librarians, at the Pape-Danforth Library, who were openly encouraged to appraise the Complainant's work. Throughout this period, the Complainant alleges that he was endlessly harassed by C and some supporting staff members. Among other incidents, he was suspended by library management (Ms. T. Town) for three days based on a fabricated report of C that he was absent from work without reasonable explanation, although he had a physician's certificate showing his absence was a result of illness. The Complainant complained to the Union, but the executive mistrusted him and chose not to pursue the matter thereby tacitly approving C's actions.

On June 14, halfway through the probation period, the Complainant was summoned to a meeting with C and Ms. Heighton to which the Union representative felt it was not necessary to attend. At this meeting, the Complainant was praised by Ms. Heighton for the excellent progress and effort he was making and encouraged to continue. There was no record of this conversation ever having taken place.

At the end of the probation period, the Complainant was advised by Les Fowley (Chief Librarian) that his probation period had been assessed to be unsatisfactory and that he would be transferred to the Bloor-Gladstone branch for further evaluation lasting another three months. Mr. Fowley also voiced the opinion that the Complainant's explanations and criticism were 'mere excuses'. Despite being assured that his work was performed well throughout this additional probation period, at the end of this term, the Complainant was dismissed for alleged 'incompetence'.

The complainant maintains that at all times his work was satisfactory. He maintains that there is no substance to any of the alleged deficiencies contained in the original or subsequent reports by C. These reports, together with that of George Levin of the Bloor-Gladstone branch, form the basis for the punitive action and ultimate dismissal taken. The complainant maintains that the reports were motivated by personal animosity by C against the Complainant. Accordingly, the Complainant approached the Union and the President Kathy Viner, personally, to request that a grievance be commenced, to enable him to question the basis of his dismissal and have the matter adjudicated.

In early December, the Complainant again approached the Union at a meeting of the executive and asked that the matter be taken to arbitration. The President advised the Complainant to accept the reports as it was deemed that there was insufficient evidence to justify the action and that the membership would be unwilling to openly contradict management and approve arbitration. The Complainant, however, insisted the matter be brought up at the membership meeting. He was advised to attend a meeting December 22, 1982, when the question would be considered. The meeting was adjourned at 8:00 p.m. for lack of a quorum, and rescheduled for January 16, 1983.

On January 16, 1983 no quorum was present, but the meeting was held down until approximately 9:00 p.m. At that time, C arrived in a group with seven or eight other persons. The meeting included a substantial number of supervisory personnel. At the meeting, the Executive recommended that C's report be accepted, and no arbitration action be taken. The membership voted in favour of the Executive recommendation.

The Complainant alleges:

- (1) The bargaining unit is inappropriate, containing members who exercise direct supervisory and management functions in relation to other members.
- (2) The presence of C in the bargaining unit, together with other supervisory personnel, was coercive, in that there was a real or apparent apprehension of ordinary members that disagreement would lead to retribution.
- (3) That given the Complainant's length of satisfactory service, and that the dismissal was primarily based on fabricated reports prepared by one person, intent upon defaming his character, denial of the Complainant's request for arbitration is indefensible. The only excuse for so doing was to protect C, another member of the unit, from defending her report. The Complainant alleges that insufficient support by the Union on his behalf is to blame.

The Complainant submits that the allegations contained in the reports which led to his dismissal cannot be substantiated on examination and requests an opportunity to have the matter arbitrated impartially.

While the focus of and undoubtedly the precipitating factor behind the complaint is the respondent's response to the complainant's discharge, which occurred on November 16, 1982, the conduct and actions by the executive and members of C.U.P.E., Local 1996 complained of began in March of 1982 and appear to be interwoven with the complainant's allegations in connection with his discharge.

3. At the outset of the hearing into the complaint, counsel for the respondent raised three preliminary arguments, namely:

- (i) that the Board ought to exercise its discretion under section 89 and refuse to hear the complaint because of the excessive delay in lodging it;
- (ii) that the statement of facts in the complaint is so lacking in particularity as to prevent the respondent from adequately preparing its defence, and,
- (iii) insofar as the complaint deals with and challenges the appropriateness

of the bargaining unit for which C.U.P.E. Local 1996 has been certified since 1976, this aspect of the complaint should not be entertained.

Counsel for the intervener supported counsel for the respondent insofar as (i) and (iii) are concerned.

4. After hearing argument from all parties, the Board ruled that evidence and argument regarding the consequences of any delay between January, 1983 and October, 1983 would be heard and a decision rendered thereon prior to a consideration of the merits, if necessary. The Board also ruled that the determination of whether the complainant can, through this complaint, challenge the appropriateness of the bargaining unit should be made as a part of the consideration of the merits of the complaint. No ruling was necessary regarding particulars because the complainant's counsel, Mr. Topp, undertook to give additional particulars and revise the complaint forthwith. This was acceptable to counsel for the respondent.

5. The evidence given by Mr. Kaljian in connection with the period specified above may be summarised as follows. Mr. Kaljian was, prior to his discharge, employed by the intervener as a librarian since 1977. At all material times he was a member of a bargaining unit for which the respondent had been certified. He was advised of his discharge on November 16, 1982 and filed a grievance regarding this. There was a grievance meeting wherein Mr. Kaljian was represented by officials of the respondent. Following the meeting, which occurred some time in December, Mr. Kaljian was advised that the union executive had decided not to take his grievance to arbitration. Mr. Kaljian requested that the membership of Local 1996 consider the matter and a membership meeting was set up for January 16, 1983. It is clear that Mr. Kaljian knew as a result of this meeting that his grievance would not proceed to arbitration.

6. Mr. Kaljian had, sometime in December, consulted a lawyer (not Mr. Topp) to obtain advice on his termination. The advice he received was to wait until the union decided whether it would take the grievance to arbitration. This is what Mr. Kaljian did. After January 16, 1983, Mr. Kaljian claimed he called the same lawyer back as quickly as he could and told him what the union had decided.

7. There were numerous changes in Mr. Kaljian's recollections about what happened between himself and this lawyer after January 16, 1983. In his examination that evidence and argument regarding the consequences of any delay between January, 1983 and October, 1983 would be heard and a decision rendered thereon prior to a consideration of the merits, if necessary. The Board also ruled that the determination of whether the complainant can, through this complaint, challenge the appropriateness of the bargaining unit should be made as a part of the consideration of the merits of the complaint. No ruling was necessary regarding particulars because the complainant's counsel, Mr. Topp, undertook to give additional particulars and revise the complaint forthwith. This was acceptable to counsel for the respondent.

by him or his lawyer in January or February. He claimed that his lawyer did not have the time and Mr. Kaljian did not have any money. Later on his cross-examination Mr. Kaljian claimed that it was not made clear to him after January 16th who should be proceeded against. Mr. Kaljian claimed that, notwithstanding his lawyer's unavailability and the repeated cancellation of his appointments between January and April he was reluctant to see another lawyer because he had already paid his lawyer a sizeable sum of money. When asked what this sum, which was paid in December, was intended to cover, Mr. Kaljian testified that it was meant to cover legal work up to the "first hearing". Mr. Kaljian claimed not to know what this meant. His lawyer did not send him a bill setting out an account for the amount paid to him in December until the letter of advice in April, 1983. Mr. Kaljian was questioned intensively about what his explanations were in connection with this and the point to which he had paid for legal work. He was very vague in his answers, at first claiming that he had never asked the lawyer what was meant by a first hearing but later acknowledged that it was in his mind in December or January that a hearing would possibly take place against Ms. Czerniakowsky and her assistants and possibly against the respondent.

8. After receiving the letter from his lawyer sometime in April or May, wherein Mr. Kaljian was notified fully of his rights against the respondent, he consulted Mr. Topp, the lawyer who ultimately represented Mr. Kaljian at the first day of hearing in this matter. Mr. Kaljian denied that he sought Mr. Topp's advice - he was just looking for "an interpretation" of his first lawyer's letter. Mr. Kaljian testified that while Mr. Topp mentioned an application being made against the union he did not give advice about section 68. Along with speaking to Mr. Topp, Mr. Kaljian spoke to "friends and neighbours". He claimed that he made up his mind to come to the Board for a remedy because these people advised him to do so. Mr. Kaljian said he knew about the fact there was a procedure before the Board by which he could go against the union from his lawyer's letter and he did not need Mr. Topp to tell him about it. Mr. Kaljian testified that he came to the Board in July and obtained the necessary forms. He claimed hMr. Kaljian did not file the complaint until October 11th.

9. No evidence was called by the respondent there were "legal terms" he needed to analyze with the aid of a dictionary. In mid-August Mr. Kaljian took the complaint forms to Mr. Topp and Mr. Topp drafted the contents thereof. The completed complaint was given to Mr. Kaljian shortly thereafter. Mr. Kaljian testified that he was not happy with the statement of facts by Mr. Topp and he therefore set about rewriting it with the help of a friend. The rewrite was finished by September 30, 1983 but Mr. Kaljian did not file the complaint until October 11th.

9. No evidence was called by the respondent or the intervener.

10. The respondent and intervener argue on the basis of *Sheller-Globe* [1982] OLRB Rep. Jan. 113 (application for judicial review dismissed by the Divisional Court, June 23, 1983) and the *City of Mississauga* [1982] OLRB Rep. March 420 that the Board should exercise its discretion and should not hear the complaint because of extreme delay. They ask the Board to note that the complaint does not simply refer to events in or around the point of discharge. Some of the events occurred more than two years before the complaint was filed. Both parties submitted that the Board must, in view of this time lapse, be given compelling reasons to proceed with the complaint. They submitted Mr. Kaljian has not given any. The applicant, who by the time of argument had retained different counsel, Mr. Wearing, argues that the onus in this situation rests upon the party alleging that delay has been such as to

require the dismissal of the complaint to prove that there has been some prejudice actually suffered by that party. In view of the fact that neither the respondent nor the intervener called any evidence, the argument cannot succeed.

11. The Board has summarized its approach to determining whether delay is such that a complaint should not be entertained in the following way in *Caravelle Foods* [1983] OLRB Rep. June 875:

9. The Board has in previous cases described delay as being either “extreme” or “unreasonable”. Extreme delay warrants a dismissal on preliminary motion. However, unreasonable delay impacts on the remedy but does not deny the complainants the opportunity to prove the violation of the Act. (See *CCH Canadian Limited* [1977] OLRB Rep. June 351.) Section 89(4) of the Act gives the Board discretion to decide whether it will inquire into an unresolved complaint. Section 72 of the Board’s Rules of Procedure ... requires that a complainant file allegations of wrongdoing “promptly” upon discovery of the wrongdoing. If, in the opinion of the Board, the allegations and particulars thereof have not been filed promptly, the Board may refuse to allow the evidence to be adduced or, alternatively, may only permit the evidence to be adduced upon specified terms or conditions. The Board has been, by and large, more willing to hear complaints than to refuse, using its remedial powers, to reduce the prejudicial effect of the complainants’ delay on the respondent. The nature of delay is assessed not only on the basis of time elapsed but the effect on labour relations or a collective-bargaining relationship if the complaint is entertained when there is no remedy to be given or the remedy would be deleterious to the relationship. In *Sheller-Globe*, [1982] OLRB Rep. Jan 113, the Board summarized the test in a section 68 complaint as follows, at paragraph 13:

...The Board has always been conscious of the need for expedition in its practices and procedures. The delay in the present case raises concerns over an appropriate remedy, if the Board *were* to permit this complaint to now proceed, which are not fully answered by the complainant’s concession as to damages. In circumstances such as the present, the onus shifts to a complainant to satisfy the Board that there are compelling labour relations reasons to cause the Board to exercise its discretion and entertain the complaint under section 89.

The thread running through all the section 68 cases dealing with delay is a concern as to the effect of the process and/or the remedy on the collective-bargaining relationship. This is because the remedy sought has usually been a demand for arbitration or restoration of lost rights, not only for monetary compensation. These remedies require the parties to the collective-bargaining agreement to do battle over an individual’s rights which they have both considered no longer an issue in their relationship because of an elapse of time. The Board’s general approach is summarized in *The Corporation of the City of Mississauga*, [1982] OLRB Rep.

March 420, (also a section 68 complaint) at paragraphs 21 and 22 as follows:

21. In recognition of the fact that it is dealing with statutory rights, the Board has not, heretofore, adopted any rigid practice with respect to the matter of delay – holding, in most cases, that it will simply take this matter into account in determining the remedy if a statutory violation is established. However, whatever the merits of this approach, the Board must also keep in mind the potentially corrosive effect which litigation can have upon the parties' current collective bargaining relationship – quite apart from the outcome. Adversarial relationships are pervasive enough in our industrial relations system without the resurrection of ghosts from the past. In the Board's view, the orderly conduct of an ongoing collective bargaining relationship and the necessity of according a respondent a fair hearing both require that unions, employers and employees recognize a principle of repose with respect to claims that have not been asserted in a timely fashion. If such claims are not launched within a reasonable time, the Board may exercise its discretion pursuant to section 89 and decline to entertain them.

22. A perusal of the Board cases reveals that there has not been a machanical [sic] response to the problems arising from delay. In each case, the Board has considered such factors as: The length of the delay and the reasons for it; when the complainant first became aware of the alleged statutory violation; the nature of the remedy claimed and whether it involves retrospective financial liability [sic] or could impact upon the pattern of relationships which has developed since the alleged contravention; and whether the claim is of such nature that fading recollection, the unavailability of witnesses, the deterioration of evidence, or the disposal of records, would hamper a fair hearing of the issues in dispute. Moreover, the Board has recognized that some latitude must be given to parties who are unaware of their statutory rights or, who, through inexperience take some time to properly focus their concerns and file a complaint. But there must be some limit, and in my view unless the circumstances are exceptional or there are overriding public policy considerations, that limit should be measured in months rather than years.

In *Caravelle Foods, supra*, the Board heard the complaint notwithstanding a delay of some eight months because there was no evidence from which it could be concluded that there was severe prejudice to the respondent and intervener's labour relations which could not be adjusted through a remedial order at the conclusion of the case. In that case the Board had before it a complaint regarding the handling of the complainant's discharge for fighting and the Board was dealing with a set of facts which were confined to the events precipitating discharge and the union's response thereto. The period of time in which that set of facts took place was approximately one month. By contrast, in *Sheller-Globe, supra*, the Board found the delay, 2-1/2 years after the section 68 complaint was potentially chrystallized, was of such a magnitude that the prejudice to the union and employer was "undeniable" and obvious because

“memories to present a defence will deteriorate for that reason alone.” During the 2-1/2 years the respondent had no awareness that the complainant was going to challenge its conclusions about the merits of her grievance and the passage of 2-1/2 years would hamper the respondent’s clear presentation of the basis of these conclusions. It was in those circumstances that the Board in *Sheller-Globe, supra*, indicated that the onus shifted to the complainant to satisfy the Board that there were “compelling labour relations reasons to cause the Board to exercise its discretion and entertain the complaint under section 89.” Similarly, in *The Corporation of the City of Mississauga* decision, *supra*, the Board considered the effect of a five-year delay between the date the respondent allegedly failed in its duty under section 68 and the filing of the complaint to be prejudicial to the ongoing labour relations between the parties to the collective agreement because if the complainant were successful in obtaining the remedy he sought under section 68, the seniority list which had existed for some years would have been put in issue and undermine actions based thereon retrospectively. It should be noted that the Board quoted with approval the statement made in *Sheller-Globe, supra*, as to the onus the complainant bears in circumstances where there is a delay which carries with it a significant prejudice to the respondent and intervener.

12. In this complaint there is a challenge made to the very foundation of the collective bargaining relationship which has existed between the respondent and intervener for many years. The challenge is that the complainant’s dismissal was founded upon reports and actions by bargaining unit members (going all the way back to 1982) who were in fact exercising managerial authority over him. The ultimate decision to discharge was the culmination of a process which began in 1982 and in which from the beginning there allegedly was improper involvement by bargaining unit members in supervisory or managerial functions. Therefore it is fair to say that the earliest point in time when the section 68 complaint materialized was in March of 1982. Thereafter it was merely a case of new breaches being added until January 16, 1983. Since the complaint is such that its earliest origination took place in March of 1982, arguably, the complainant would have to justify or explain his failure to complain from that point forward. Notwithstanding this, the Board decided to direct the parties’ evidence and argument at the complainant’s conduct between January 16, 1983 and October 11, 1983 because to extend the preliminary inquiry as far back as March of 1982 would potentially entail the hearing of the whole complaint. This would not have been an acceptable course of action because in the event the matter was unsuccessful, the complaint potentially would have required a hearing *ab initio* regarding the merits. Therefore it should be clear that this decision relates solely to the prejudicial effect of the time lapse between January and October of 1983 and whether this should cause this Board to decide not to hear any part of the complaint.

13. The question before me is whether a nine-month delay in the circumstances has created such prejudice to the parties as to impose upon the complainant an onus to come forward with a compelling labour relations reason for having his complaint heard. For this purpose it must be recognized that the extent of the deterioration in the abilities of parties to mount a defence to the complaint or the potential prejudice to their collective bargaining relationship as of January, 1983 cannot be considered except to consider whether an additional nine months was the difference between prejudice which could be reflected in a remedial order and extreme prejudice warranting a refusal to hear.

14. The length of delay in this instance is not of such a nature that it must be concluded there is prejudice to the abilities of the respondent to mount an effective defence. In addition there was no positive evidence from the respondent that any part of its defence had become

unavailable as a result of the respondent's perception during the relevant nine months that the complainant was not going to be litigating the respondent's actions vis-a-vis his discharge grievance. Any threat posed to or undermining of the collective bargaining relationship between the respondent and the intervener resulting from the success of the allegations regarding the period between March, 1982 and January 16, 1983 have not been proved to be significantly increased by the additional passage of nine months. While the complainant's explanation for his actions following his knowledge of a remedy against the union being available under the *Labour Relations Act* (which knowledge was present sometime in May) shows he was dilatory, this is not sufficient to cause the Board to refuse to hear the merits of the complaint.

15. For all these reasons, the preliminary motion that the complaint not be heard because of extreme delay between January 16, 1983 and October 11, 1983 is rejected. Therefore, the matter is directed to the Registrar for relisting for hearing before a differently constituted panel.

1923-83-R International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., Applicant, v. Unlimited Textures Company Limited, Respondent, v. Group of Employees, Objectors

Certification – Membership Evidence – Petition – Practice and Procedure – Board reviewing and confirming policy as to exercise of discretion to direct vote – Board undertaking own investigation only where allegation involving “no-pay” or “no-sign” – No weight given to hearsay evidence of coercion – Whether allegation of threat raised in timely fashion and adequately particularized – Threat unrelated to membership solicitation not causing Board to direct vote – Board not “staying” proceedings to permit judicial review application

BEFORE: Owen V. Gray, Vice-Chairman and Board Members F. W. Murray and L. C. Collins.

APPEARANCES: *Kenneth Simpson for the applicant;*

Leon Paroian, Q.C., Raymond Colautti and Paul Delaney for the respondent; Ross S. Valdis, Mary Cartier and Jenny Moellendorf for the objectors.

DECISION OF THE BOARD; January 25, 1984

1. This is an application for certification.

• • • •

3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* (“the Act”).

4. At the hearing of this application, the parties agreed upon the following description of a bargaining unit, which the Board finds is a unit appropriate for collective bargaining:

all employees of the respondent at its Industrial Platers (Windsor) Company Division in Windsor, Ontario, save and except foremen, those above the rank of foreman, office and sales staff, and persons regularly employed for not more than twenty-four hours per week.

5. The respondent employer filed a list of employees in the bargaining unit described by the applicant on the application date, with a total of 35 names. All of these employees fall within the bargaining unit determined in paragraph 4 of this decision.

6. On or before November 28, 1983, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the Act to be the time for ascertaining membership and objection, the applicant trade union filed 24 combination applications for membership and receipts, 23 of which bore signatures which coincided with names on the employer's list. Each document is appropriately dated, bears original signatures and indicates the payment and receipt of \$1.00. The receipts have been countersigned. The documents were gathered by more than one collector. The applicant trade union also filed a Form 9 Declaration duly executed by a responsible official of that union, attesting to the authenticity of the membership evidence.

7. Three written statements of desire variously dated were filed with the Board on or before the terminal date. Together these contain 10 names, 2 of which coincide with names of those who signed membership applications. In accordance with its usual practice, the Board gave notice of receipt of these statements to the applicant and respondent, advising those parties of the dates and text of the statements, but not of the names of the persons who had signed them. One of the three documents reads as follows:

November 22, 1983

In the matter of Application for Certification between the applicant, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., and Industrial Platers (Windsor) Co., we the undersigned employees of the respondent do not wish to be certified as a bargaining unit.

(8 signatures)

Mary Cartier
Group Representative
1278 Windermere
Windsor, Ontario
N8Y 3E8

The second document reads as follows:

November 23

TO WHOM IT MAY CONCERN:

I, (name), herewith wish to withdraw my support for union certification at Industrial Platers (Windsor) Co., division of Unlimited Textures Co. Ltd.

This is being done of my own free will.

(Signature)

The third document read as follows:

November 23, 1983

TO WHOM IT MAY CONCERN:

I, (name), herewith wish to withdraw my support for union certification at Industrial Platers (Windsor) Co., division of Unlimited Textures Co. Ltd. because I was not fully informed as to what the document was that I was signing and felt coerced into signing it. Now that I fully understand the impact of the situation, I freely withdraw my support.

(signature)

8. On the day of and prior to the hearing in this matter, representatives of the applicant union, respondent employer and employee objectors all met with a Labour Relations Officer. The Board customarily assigns Labour Relations Officers to meet with the parties to each certification application which comes before the Board for hearing, in an attempt to resolve the issues which are or might be in dispute between the parties in relation to the application. This frequently results in a resolution of all such issues and a waiver by the parties of the necessity of a formal hearing. It also often reduces the range of issues which remain for the Board to adjudicate in a formal hearing. The Officer in this case was able to obtain the agreement of the parties on a description of the appropriate bargaining unit. Although the description agreed to at that point was not the same as was ultimately agreed to at the hearing and approved by the Board, the employees covered were the same. The Officer then reviewed with the parties the balance of the matters set out earlier in this decision. The Officer advised the parties that of the 35 employees on the employer's list, membership evidence had been submitted on behalf of 23 employees. The Officer also advised the parties that only two of those 23 employees had signed the petition. The Officer explained to the parties that it appeared, subject to the Board's normal second check, that the applicant was in a certifiable position and that there was not sufficient petition overlap to cause the Board to inquire into the voluntariness of the petition. The parties were asked whether they felt it necessary to appear before the panel to make any further representations with respect to this application. Counsel for both the respondent and the objectors said they did.

9. At the beginning of the hearing in this matter, the Board indicated to the parties it wished to review with them in an informal way the matters which it understood would have

been reviewed with them by the Officer. The Board then reviewed with the parties the matters referred to in the preceding paragraphs of this decision, and in the course of that review settled with the parties the description of the appropriate bargaining unit.

10. The Board's review of the items covered in the meeting with the Officer concluded with the observation that, having regard to the membership count, the overlap of petition signatures and membership evidence was not alone sufficient to cause the Board to exercise its discretion under section 7(2) of the Act in favour of directing a representation vote. The Board then invited parties' submissions with respect to these and any other matters they wish to raise.

11. Counsel for the respondent spoke first. He submitted that the Board had amended the *Labour Relations Act* by adopting the practice or policy normally followed by the Board in determining the effect petition signatures will have on the exercise of the Board's discretion under section 7(2) of the Act. Counsel favoured us with what he conceded was an argument often made to the Board, to the effect that the Board should be more liberal in directing representation votes in cases where the statute permits certification without a vote. Invited to indicate what facts and circumstances should lead the Board to order a vote in this case, counsel referred to evidence he said the employee objectors had to offer. This evidence, he said, was in the nature of allegations of intimidation and coercion. He argued that the Board was obliged to conduct its own investigation into those allegations.

12. Counsel for the employee objectors said that his client was concerned about the membership count which had been announced both by the Board and, earlier, by the labour relations officer. He said that in the course of circulating her petition against the union, his client had inquired of each of the employees whether he or she had signed a union card. On the basis of the answers received, he and his client had come to the hearing expecting that the applicant union could not establish sufficient membership support for certification without a vote. The announced membership count and petition overlap could only be explained, he claimed, if the Board had before it membership evidence purportedly signed by some of the persons who had told his client they had not signed cards and would not sign her petition. Counsel provided the Board with the names of eight persons, and alleged that any membership evidence submitted on behalf of those persons must be fraudulent.

13. The second matter raised on behalf of the objectors was the allegation of coercion contained in the third petition document referred to in paragraph 7 of this decision. The third matter raised was an allegation that threats had been made to an employee's job security by "union forces". In response to a request from the Board that he particularize this last allegation, counsel named one Steven Muzzin as the author of the threats which counsel said had been made on Friday, November 18, 1983. Counsel acknowledged that his client was immediately aware of the incident when it occurred. He also acknowledged that no notice of this allegation would be found in any material filed with the Board or provided to the union by the objectors. He conceded that no reference had been made to it before the count was announced by the labour relations officer. He explained that this last allegation had not been raised, and the previous allegation had not been particularized, prior to the hearing because he and his client had thought it was unnecessary to put these allegations in issue, having regard to the membership strength they thought the applicant union had. It was only after the count had been announced that he and his client decided to pursue the question of coercion alleged in the petition document and to raise for the first time the alleged threats by Mr. Muzzin.

14. The applicant's representative objected to the Board's entertaining any of the allegations made by the objectors. With respect to the allegations of fraudulent membership evidence, he argued that the Board should rely on the comparisons it had made between signatures on the membership evidence and specimen signatures provided by the respondent employer. With respect to the alleged threats and coercion, he said the Board should not hear those allegations because they had only been raised and particularized after the count was announced.

15. The object in certification proceedings is to determine whether a majority of employees in a unit appropriate for collective bargaining wish to be represented by the applicant trade union in their relationship with their employer. Important considerations underlie the Legislature's choice between membership evidence and the representation vote as the means of ascertaining majority wishes (see Weiler, P.C., *Reconcilable Differences*, (Carswell, 1980), at pp. 37-49 for a review of these considerations). The Legislature's choice of membership evidence as the primary basis for the certification decision recognizes the obvious correlation between a desire for trade union representation and the act of joining a trade union. Any uncertainty inherent in equating the two is balanced by striking a confidence level of fifty-five per cent membership at and below which the appearance of majority support for trade union representation must be confirmed by a representation vote. When there is satisfactory evidence that over fifty-five per cent of the employees in the unit are members of the applicant, the Act authorizes certification without a vote. In giving the Board a discretion to order a vote even when over fifty-five per cent membership is demonstrated, the Legislature recognized the possibility that circumstances other than the number of members in the unit might, in a particular case, make trade union membership seem less reliable as a measure of an employee's desire for trade union representation. That discretion should be exercised in a manner consistent with the balance struck by the Legislature in emphasizing membership evidence as the method of determining employee wishes when membership support exceeds fifty-five per cent (see *Cleveland-Cae Metal Abrasive Limited*, [1979] OLRB Rep. Feb. 81 at ¶8; *Baltimore Aircoil Interamerica Corporation*, [1982] OLRB Rep. Oct. 1387 at ¶49; *Walbar of Canada, Inc.*, [1982] OLRB Rep. Nov. 1734 at ¶17.)

16. Rule 73 of the Board's Rules of Practice makes provision for the filing by employees of evidence of their objection to certification. As with membership evidence, evidence of objection must be in writing, signed by the employee(s) and filed not later than the terminal date for the application (which is ordinarily the date set by the Board under section 103(2)(j) of the Act as the date as of which employee wishes are to be ascertained). Form 6, the Notice to Employees of Application for Certification, refers to such written evidence as a "statement of desire"; such documents are also commonly referred to as "petitions". Subsection 5 of Rule 73 sets out the Board's requirement that *viva voce* evidence be introduced at hearing as to the circumstances concerning the origination and circulation of the petition and the manner in which each signature thereon was obtained. The object of that inquiry is to determine whether the petition is a voluntary expression of the wishes of its signatories (see *Baltimore Aircoil Interamerica Corporation*, *supra*, ¶40.)

17. If a petition is shown to be the voluntary expression of the wishes of its signatories, the effect then given to it depends on the extent to which it casts doubt on the significance of membership in the applicant as evidence of the employees' desire for representation by the applicant. In the use of membership evidence to test employee wishes, an employee for whom no membership evidence has been filed is treated as though he or she opposes representation

by the applicant. Therefore, a non-member's signature on the petition adds nothing to the assessment of support for representation by the applicant. However, the signature on the petition of an employee who is a union member casts doubt not on that employee's status as a member, but on the otherwise reasonable inference that the employee's membership in the trade union reflects a desire for representation by that trade union in collective bargaining with his employer. The evidence of an employee's membership, that is to say, the inference which otherwise reasonably follows from proof that the employee is a member, is "clouded" in that sense by that employee's subsequent signature on a voluntary petition. If the membership evidence which remains unclouded would not alone be sufficient to support certification without a vote, then the Board ordinarily exercises its discretion under section 7(2) by ordering a representation vote. However, the petition speaks only to the desires of those who sign it; its existence casts no doubt on the desires of those who did not sign. One employee's change of heart cannot logically be given any more weight than another's consistent opposition. If the membership evidence which remains unaffected by the petition is itself otherwise qualitatively satisfactory and its quantity establishes that more than fifty-five per cent of the bargaining unit employees are members of the applicant, then faithfulness to the scheme of section 7 of the Act requires that the application be treated no differently than if the Board had received neither the petition nor the membership evidence thereby affected. In other words, such a petition is not considered "relevant" to the exercise of the Board's discretion under section 7(2) because it will not alone warrant a decision ordering a vote. If a petition is not relevant, it is unnecessary to determine whether it is voluntary. To take any other approach would be to ignore the Legislature's determination that satisfactory evidence of membership of over fifty-five per cent of the employees in a bargaining unit is evidence of majority support for trade union representation sufficient to permit certification without a vote. The approach described has been applied by the Board openly and consistently for well over twenty-five years. The *Labour Relations Act* has been amended many times in that period. Although amendments to the Act from time to time have altered the levels of membership required for certification with and without a vote, none has been directed at this consistent exercise of the Board's discretion to order a vote. By continuing to apply that test of the relevance of and weight given to petition signatures when exercising its discretion, the Board does not "amend the Act" – it avoids doing so.

18. A voluntary petition is not the only factor the Board can and will consider in deciding whether to order a representation vote despite evidence that over fifty-five per cent of the employees in the bargaining unit are members of an applicant trade union. The age of the evidence of membership as of the date of filing may weaken the assumption that it represents the present wishes of the employees on whose behalf it is filed; the Board may conclude that such "stale" evidence requires confirmation in a representation vote: *Primo Importing and Distributing Co. Ltd.*, [1981] OLRB Rep. July 953. A vote may be ordered where the applicant has led applicants for membership to believe that certification would not take place without a representation vote: *Carleton University*, [1975] OLRB Rep. Apr. 308. Where the circulation of a petition in opposition to certification is impeded by intimidation or coercion, the Board may exercise its discretion under section 7(2) to order a vote in order to ensure that employee wishes are ascertained: *St. Michael Shops of Canada Limited*, [1979] OLRB Rep. April 346. It will not do so, however, unless the impugned behaviour is of such a nature that it would deter a reasonable employee, a test which is not likely to be satisfied if the person at whom such behaviour is directed is undeterred: *The Kendall Company (Canada) Limited*, [1975] OLRB Rep. Aug. 611 at paragraphs 16 and 20; *Dupont of Canada Ltd.*, [1961]

OLRB Rep. Jan. 360. These examples are illustrative, not exhaustive, of the circumstances in which the Board might order a vote.

19. The Board may also direct a representation vote despite evidence of over fifty-five per cent membership if intimidation or coercion has been employed in obtaining that evidence: *Wilcolator (Canada) Ltd.* 59 CLLC ¶18,146; *PRC Chemical Corporation of Canada Ltd.*, [1980] OLRB Rep. Dec. 1805. Intimidation or coercion in this context means something more than social pressure: *Dupont of Canada Ltd.*, *supra*. This subject was reviewed in *the Kendall Company (Canada) Limited*, *supra*, in the following terms:

In all cases alleging improper trade union conduct the Board first begins by assessing the nature of the conduct – the test being would it deter the reasonable employee? If the answer to this question is in the affirmative the Board must go on to assess the possible significance of the conduct and in this regard the identities of those persons involved are very important. Where the action impugned is that of a responsible official of the trade union a single indiscretion may cause the Board to conclude that it cannot place reliance on any of the evidence of membership submitted by the union. Where the irregularity relates to evidence of membership procured by a person of lesser rank in the union organization, the actual cards involved may be disallowed and the weight to be given to the remaining evidence of membership will depend on the nature of the irregularity and the extent to which the objectionable practice was resorted to in the signing up of members. (See *Webster Air Equipment Company Ltd.* 58 CLLC para. 18,110; *Walter E. Selck of Canada Ltd.* [1964] OLRB Rep. June p. 138; *Linhaven Home for the Aged* [1962] OLRB Rep. May 66.)

After reviewing a number of cases in this area, the Board in the *Kendall* case observed:

A reading of these cases demonstrates the Board's sensitivity to the realities of organizational activity. Improper conduct on the part of union officials may be symptomatic of much broader unlawful actions. Moreover, threats by trade union officials have a ring of malice that is qualitatively different from the disfavour of a fellow employee caught up in the "heat" of campaign activity. A fellow employee's threat is likely to be recognized for what it is – "an isolated outburst by a hot-headed partisan". Further, such persons are seldom capable of carrying out their threats and for this reason men and women of ordinary convictions are not likely to be inhibited from exercising rights under the Act.

Improper behaviour by rank and file employees who have no responsibility for or in connection with an organizing campaign is not normally regarded by the Board as casting doubt on membership evidence: *Alderbrook Industries Limited*, [1981] OLRB Rep. Oct. 1331, where the Board observed at paragraph 13:

Unfortunate as it may be, it is not uncommon for antagonism to be generated between employees who line up on opposite sides of a campaign

for union representation. Statements by any person amounting to intimidation or coercion of an employee, whether they are made for or against a union, are clearly contrary to section 70 of the *Labour Relations Act* and are grounds for a complaint under section 89 of the Act. They may also form the basis for criminal charges. It does not follow, however, that the indiscretions of employees, whether they favour a union or sympathize with their employer, are to be held against the principal parties to an application for certification. The Board can no more hold against union a verbal threat made to an employee's job security by an indiscreet employee who is neither a union officer nor a collector of union membership cards than it can hold against an employer similar threats made by a fervently anti-union employee acting on his own. Evidence of widespread threats which are made by neither the employer nor the union might, of course, cause the Board to resort to the further evidence of a representation vote.

20. A party proposing to rely on allegations of intimidation, coercion or other improper conduct is obliged to give notice and full particulars of the allegations at the earliest opportunity. Rule 72 of the Board's Rules of Procedure provides:

(1) Where a person intends to allege, at the hearing of an application or complaint, improper or irregular conduct by any person, he shall,

(a) include in the application or complaint; or

(b) file a notice of intention that shall contain,

a concise statement of the material facts, actions and omissions upon which he intends to rely as constituting such improper or irregular conduct, including the time when and the place where the actions or omissions complained of occurred and the names of the persons who engaged in or committed them, but not the evidence by which the material facts, actions or omissions are to be proved, and, where he alleges that the improper or irregular conduct constitutes a violation of any provision of the Act, he shall include a reference to the section or sections of the Act containing such provision.

(2) Where, in the opinion of the Board, a person has not filed notice of intention promptly upon discovering the alleged improper or irregular conduct, he shall not adduce evidence at the hearing of the application of such facts, except with the consent of the Board and, if the Board deems it advisable to give such consent, it may be so upon such terms and conditions as it considers advisable.

(3) Where a statement in an application or complaint or in any document filed under these Rules in respect of the application or complaint is so indefinite or incomplete as to hamper any person in the preparation of his case, the Board may, upon the request of the person made promptly upon receipt of the application, complaint or document, direct that the

information stated be made specific or complete and, if the person so directed fails to comply with the direction, the Board may strike the statement from the application, complaint or document.

(4) No person shall adduce evidence at the hearing of an application or complaint of any material fact that has not been included in the application or complaint or in any document filed under these Rules in respect of the application or complaint, except with the consent of the Board and, if the Board considers it advisable to give such consent, it may do so upon such terms and conditions as it considers advisable.

The purpose of this Rule was explained in *Trigiani Contracting Limited* [1979] OLRB Rep. Feb. 141:

“7. That section was a twofold purpose grounded in both legal considerations and in industrial relations considerations. The legal consideration implicit in section 47 [now 72] of the Board’s Rules of Procedure is a recognition of the rule of natural justice that anyone charged with wrongdoing should have sufficient notice of the charge against him. The labour relations consideration is a recognition that the realities of union organization are such that a delay of Board proceedings may serve to defeat the union. A union may successfully defend charges made against it only to discover, upon the late granting of a certificate, that its support among the employees has substantially eroded because, for reasons often not fully understood by rank and file employees, it has failed to get certified promptly and commence immediately to bargain on their behalf. For that reason section 47 [now 72] of the Board’s Rules of Procedures seeks to strike a balance between natural justice and the avoidance of delay in certification proceedings or any other proceedings before the Board. In an application for certification both the interests of natural justice and industrial relations are best served when allegations of wrongdoing are made in sufficient time and with sufficient particularity that an applicant union is not prejudiced either by surprise or by being forced to seek adjournment and the delay of its own application. Therefore, where allegations against an applicant are not filed in a timely manner or with sufficient particularity the Board may refuse to entertain them. (*Fleck Manufacturing Limited* 62 CLLC ¶16,236; *Cable Tech Wire Company Limited* (as yet unreported) Board File No. 0297-78-R, June 21, 1978).”

The need for expedition in labour relations matters is well recognized: *Hotel and Restaurant Employees Union v. Nick Masney Hotels Ltd.*, [1970] 3 O.R. 461 (C.A.); *Jordon v. York University Faculty Association* (1978) CLLC ¶14,132 (Div. Ct.); *Re Flamboro Downs Holdings Ltd. and Teamsters Local 879*, (1979) 24 O.R. (2d) 400 (Div. Ct.); and, *Journal Publishing Company of Canada Ltd. et al v. The Ottawa Newspaper Guild, Local 204 et al*, (unreported, Ontario Court of Appeal, March 31, 1977) wherein Estey, C.J.O. (as he then was) observed:

In the law which has grown up around labour relations in this province, and indeed elsewhere where the common law is pursued, the overriding principle invariably applied is that labour relations delayed are labour relations defeated and denied.

Rule 72 applies to all parties to the process. In *Cable Tech Wire Company Limited*, [1978] OLRB Rep. June 496 (judicial review denied November 10, 1978, unreported) the Board refused to entertain allegations known to the employer for two weeks before notice thereof was finally given on the last business day before the Board's hearing. Counsel's excuse that he had until then been unaware that witnesses were available to prove the allegations was not considered sufficient reason for having withheld them. In *Gignac, Sutts, Nosanchuk*, [1973] OLRB Rep. Aug. 438, the Board refused to entertain union charges advanced in support of certification without a vote when the events alleged were known to the union for as much as a month before notice was given. In *Fleck Manufacturing Limited*, 62 CLLC ¶16,236, the Board refused to entertain objectors' allegations of impropriety in the union's collection of membership evidence, when the allegations were first raised at the hearing of the union's certification application although known to counsel for the objectors for nine days prior. In *Fleck* the Board said:

It is incumbent on all parties to proceedings before the Board to investigate matters relevant to their cases as early as possible and if they intend to make allegations of improper or irregular conduct against another party to do so promptly. The object of this requirement, which finds expression in section 48 [now 72] of the rules, is obviously to expedite and facilitate the hearing and processing of applications under the Act and to avoid prejudice, delay or embarrassment to the parties involved. Delayed and last-minute allegations, which lead to adjournments or cause prejudice, embarrassment or unnecessary expense to the other parties, and which with reasonable diligence could have been made at a more timely stage of the proceedings will not be entertained except for good and sufficient cause.

21. It is not the Board's practice to initiate or conduct its own investigation into allegations of intimidation or coercion in the solicitation of membership evidence; these must be alleged and proven by the party making the charge: *Alcan-Colony Limited*, [1963] OLRB Rep. June 159; *The Kendall Company (Canada) Limited*, *supra*; *Josh Industries Incorporated*, [1980] OLRB Rep. Dec. 1741, ¶16; *Northern Plastics Ltd.*, [1983] OLRB Rep. July 1133. The Board will, however, investigate allegations that membership evidence is defective either because the employee on whose half it is submitted did not make the payment referred to therein or did not sign the card at all. The Board's approach to such allegations was described by its first Chairman, J. Finkelman, in *The Ontario Labour Relations Board and Natural Justice*, (Industrial Relations Centre, Queen's University, 1965) at page 33:

... [A]ny party to the proceedings or any employee concerned may inform the Board that certain named persons, on whose behalf there is reason to believe membership cards were submitted to the Board in support of the application, did not sign the membership cards purporting to bear their signatures or did not pay the dues which the receipts submitted on their behalf purported to acknowledge. The names so furnished to the

Board by an opposing party are checked against the membership cards filed by the union, and, if any person, whose names is so furnished is claimed by the union as a member, that person will be interviewed by an examiner.

Where a person is interviewed by an examiner in the circumstances just outlined, he is requested to complete a questionnaire as to whether he signed the card or paid the requisite dues, as the case may be. Where the person interviewed states to the examiner that he did sign the card and did pay the requisite amount of dues, no further action is taken If the person interviewed states to the examiner that he did not sign the card or did not pay the requisite fee, the Board conducts a formal inquiry into the matter. All parties are advised of the Board's intention to hold such an inquiry and they are given information as to the nature of the matters that will be inquired into. The name of the employee involved and the names of any other persons who, to the knowledge of the Board, may be able to cast light on the situation – any person who purported to witness the employee's signature, the collector of the dues, any person who may have been present during the transaction – will be revealed to all parties before the hearing takes place. These persons are summoned by the Board itself. At the hearing, the Board examines the witnesses in the first instance and then makes them available to the other parties for cross-examination. The other parties are of course entitled to present rebuttal testimony if they see fit to do so. ... [T]he Board is so dependent upon documentary evidence filed by the union that, where there is an allegation of forgery or fraud, the Board must look into the matter ...

(see also *Genaire Ltd.* 59 CLLC ¶18,140; *Alcan-Colony Limited*, *supra*; *The Kendall Company (Canada) Limited*, *supra*; and, *The Georgian Building Corporation*, [1981] OLRB Rep. Mar. 275.)

22. It was against the background of this jurisprudence that the Board considered the parties' submissions. The Board ruled that it would respond to the objectors' "no-sign" allegations by conducting its usual investigation. It explained the Board's procedure in such cases and emphasized to the parties that no hearing would be called to further enquire into those allegations if the Board's initial investigations failed to disclose any impropriety. Counsel for the objectors was asked whether he wished to lead any evidence of his own with respect to those allegations. He said he did not.

23. The petition document making reference coercion did not identify the person whose behaviour the petitioner felt was coercive, nor did it describe that behavior or specify the time and place at which it occurred. As the allegation had not been the subject of a separate, particularized charge, the trade union upon receipt of the text of this document might have interpreted the reference to coercion as a merely colourful statement of the petitioner's reasons for executing the petition. The document would not necessarily put the trade union on notice that it must meet a charge that it has engaged in unfair labour practices, nor was this document sufficiently particular to comply with Rule 72(1). It was at least arguable, however, that it fell within subparagraph (3) of the Rule, which would have put an onus on the trade union to request particulars. By contrast with that allegation, which was at least the subject

of an insufficiently particular reference in a document received by the union prior to the hearing, the allegations against Mr. Muzzin had been neither raised nor particularized until the day of the hearing. The Board's first ruling with respect to these two allegations was that it would hear the evidence-in-chief of the objectors with respect to the coercion referred to in the petition document, reserving the applicant's right to argue thereafter with respect to the failure to provide timely and full particulars and the consequences that should have for the reception of that evidence and for the continuation of the hearing. The Board further ruled that when it heard that argument it would also hear argument on the question whether it should entertain any evidence of the alleged threats by Mr. Muzzin.

24. Counsel for the objectors then called Mary Margaret Cartier, an employee of the respondent, as its first and only witness with respect to the coercion alleged in the petition document. Ms. Cartier testified she was the representative of the group who had put together the petitions filed with the Board in this case. She was the witness to the signature on the petition document in which coercion is alleged. She said she had approached that signatory, whom she identified by name. We shall refer to him simply as "the petitioner". Ms. Cartier described the petitioner as "slow". She said he does not understand everything he is told. She approached him and asked if he had signed a union card. He told her he had, but had not known what he was signing. A "union person" had driven him home one day and, at the end of the ride, had asked him to sign a card and pay a \$1.00, which he had done. Ms. Cartier asked him if he understood what a union was about. He said no. She then asked him to go home and ask his father about what he done. Ms. Cartier explained that she did this because she did not feel schooled enough to explain the matter herself. The next day, the petitioner told Ms. Cartier he had spoken to his father, who told him not to sign for a union. He later signed the petition document saying he had felt "coerced". Ms. Cartier testified that the petitioner in question is 22 years old. She named the person whom the petitioner told her had obtained his signature and received his dollar. She testified that that person is a full-time employee of the respondent.

25. When this evidence was introduced, the applicant's representative objected that it was hearsay evidence of what had taken place between the petitioner and collector. In the ensuing argument we were told that no attempt had been made to subpoena the petitioner. The Board ruled at that point that it would hear the evidence and determine later what weight, if any, would be given to it. When the evidence-in-chief of Ms. Cartier was completed, the applicant's representative argued again that the Board should not give any weight to this hearsay evidence. He submitted that what had been described did not amount to coercion, and noted that the petitioner had, in any event, exercised his option to withdraw his support.

26. Counsel for the objectors argued that we should accept this hearsay evidence. He said it demonstrated that coercion was used in obtaining membership evidence and that potential members were not fully informed with respect to the union when their membership was solicited. He argued the evidence would lead the Board to speculate that there might have been other incidents with other people who might have had language problems, for example. Counsel for the respondent argued that we should accept this hearsay evidence on a policy basis. Membership cards are hearsay, he said. The acceptance of Mrs. Cartier's hearsay could only lead to a vote and not a complete denial of the right to represent employees, he argued, and we should therefore accept the hearsay and "err on the side of the democratic process." Neither counsel for the objectors nor counsel for the respondent offered any evidence that there were any other "slow" employees, any other allegedly misinformed or uninformed employees

or any other employees who had been approached by the person who collected the card from the petitioner described in Ms. Cartier's evidence. That collector's signature does not appear on any card filed with the Board on behalf of any employee other than the petitioner.

27. The Board then announced the following ruling:

Having considered the submissions of counsel, we are satisfied that we should not give any weight to hearsay evidence tendered for the purpose of showing that an employee was coerced into signing a union card. To do so would be to deny the union and the person allegedly responsible for the coercion the right to confront and cross-examine his accuser. Further, we are satisfied that the evidence, if accepted, would not amount to such coercion as would lead us to give that evidence any more effect than we would give to evidence that the employee in question voluntarily changed his mind and signed a petition.

Accordingly, the applicant need not respond to that evidence.

28. The Board then heard argument on the question whether it should entertain evidence with respect to the alleged threats by Mr. Muzzin. By way of amplification of his earlier submissions, counsel for the objectors stated the evidence would be that Mr. Muzzin approached his witness during the work period at a time when signatures were being collected. In what began as a friendly discussion of the advantages and disadvantages of the union, Mr. Muzzin made threats as to what would happen to the witness if the union got in. Counsel argued that this incident, if proved, would taint the "entire picture" of how the union went about collecting signatures. He said this was more serious than the coercion earlier alleged. It would, he said, be direct evidence, not hearsay evidence, of a threat to the witness' livelihood. Counsel for the objectors repeated again the explanation that this allegation had not earlier been raised because its importance was not apparent until the count was announced. Counsel for the respondent argued that the Board would readily entertain similar allegations if made by a trade union against an employer, and that such allegations would lead to automatic certification without a vote, citing *Lorain Products (Canada) Ltd.*, 78 CLLC ¶16,118 as authority for those propositions. The applicant's representative argued that the person allegedly threatened had not signed a card and did not respond to the alleged incident by filing charges at the time. There had been ample opportunity to process charges, he said, and the allegations had not been filed or particularized in a timely manner. The applicant's representative took great exception to the fact that these charges were not raised until after the card count had been announced. He questioned the relevance of the *Lorain Products* case, and argued that the Board should not hear the evidence.

29. A majority of this panel of the Board ruled that it would reserve the question whether the evidence would be entertained until after it had heard the evidence-in-chief of the witness herself. Mr. Collins, dissenting, would have ruled against hearing any part of the evidence, on the basis of the objectors' failure to raise the allegations at any time prior to the announcement of the count.

30. The witness offered in support of these allegations was, again, Mary Margaret Cartier. She testified that she works alone in the respondent's hard chrome department. While at

work there between the 9 and 10 a.m. on the morning of November 18, 1983, she was approached by Steve Muzzin, a fellow employee who works in another part of the plant. They started talking about the pros and cons of the union. The discussion changed to a discussion of the different jobs in the shop. Mr. Muzzin asked Mrs. Cartier whether she was the only one who could do her job. She replied that she was the only one who could do it as well as she did. He then said that when the union came in he would come over and take her job away from her, and she would be out on the street looking for a job. Asked whether the union was then in the process of collecting signatures, she said she thought so. She had not started her petition by then; she started it the following Monday. In response to questions from the Board, Mrs. Cartier said she could not recall which of the two of them had first mentioned the union in this discussion. She did not know how Mr. Muzzin could go about getting the union to take her job from her. She thought he would "get help somewhere". Mr. Muzzin did not ask her to sign a union card, nor did he suggest that her job would be safe from him if she did sign a card. No one else had been involved in this conversation. Only one other employee had been within hearing distance. She had later spoken to that employee, who said that he had not heard what she and Mr. Muzzin had discussed. Not surprisingly, her response to this incident was to commence the circulation of her petition on the Monday following, which was the day Notice of this application was posted in the respondent's plant. After the Board had completed its questions, counsel for the objectors advised the Board he had completed the evidence-in-chief in support of the allegations against Mr. Muzzin. Counsel further advised the Board that his clients were not aware of, nor did they intend to tender evidence of, any approaches by Mr. Muzzin to any other employees.

31. Nothing in Mrs. Cartier's evidence supported counsel's earlier allegation that Mr. Muzzin was an employee organizer for the union. His name does not appear as collector on any of the membership evidence filed with the Board. The alleged threat was not connected with the obtaining of membership evidence. Mrs. Cartier did not sign a card as a result of the threat. There was no suggestion she was in any way deterred from exercising her rights as a result of the alleged threats. Nothing in Mrs. Cartier's testimony persuaded us that any of the membership evidence before us could in any way be considered "clouded" by the alleged behaviour of Mr. Muzzin. The petition documents affected only two cards, one of which was the card signed by the petitioner whose story had been described in Mrs. Cartier's earlier evidence. 21 membership cards were, in our view, entirely unaffected by any of the matters raised either by the objectors or by the respondent. As that level of membership evidence satisfied the criteria in the Act for certification without vote, the Board ruled orally as follows:

Assuming, without deciding, that the petitions are voluntary, we are satisfied that the evidence of Mrs. Cartier, if accepted in its entirety, would not itself or in combination with the hearsay evidence rejected earlier lead us to exercise our discretion to order a vote in this case.

Subject to the Board's usual second checks and to the outcome of its customary investigation into the "no-sign" allegations, a certificate will issue.

32. Counsel for the respondent then asked that the Board stay any further steps in these proceedings pending his filing of an application for judicial review on behalf of his client, on the ground that the Board allegedly declined to address the exercise of a statutory discretion.

Assuming, without deciding, that we had a discretion to “stay” the proceedings at the point we had by then reached, we ruled we would not do so.

33. Following the hearing in this matter, the Board investigated the “no-sign” allegations referred to earlier, to which the objectors had, during the hearing, added another name, for a total of nine names. Each of these names was reviewed against the membership evidence submitted by the applicant. Those of them for whom membership evidence had been filed were interviewed by a Labour Relations Officer. Each of those persons verified that they had signed the cards submitted on their behalf. The investigation revealed no basis for any further inquiry.

34. Accordingly, we are satisfied that more than fifty-five per cent of the employees in the bargaining unit as of the application date were members of the applicant trade union on the date determined under section 103(2)(j) of the Act, as set out in paragraph 6 of this decision. We confirm our decision not to order a representation vote in these circumstances.

35. A certificate will therefore issue to the applicant trade union with respect to the bargaining unit described in paragraph 4 hereof.

CONCURRING OPINION OF BOARD MEMBER L.C. COLLINS;

1. While I concur in this panel’s decision dated January 25th, 1984, I wish to comment further on the reasons for my dissent from the ruling referred to in paragraph 29 of that decision.

2. I objected to hearing evidence from Mrs. Cartier of threats she alleged were made against her by Mr. Muzzin on November 18, 1983, because the charges were first raised on the day of the hearing, about three weeks after the alleged incident. There was plenty of time available before the hearing to have notified the Board of the charge and to have furnished the applicant with particulars of the charge. I considered that the charges were untimely and could have resulted in a needless further delay in these certification proceedings. I, therefore, would have ruled that we would not hear any of her evidence, and would have based my ruling on the authorities recited in paragraph 20 of the main decision in this case.

3. Although I concurred in the decision to launch the Board’s usual investigation into allegations of “no-sign”, I wish to record here my concern about the events which prompted us to do so. As noted in paragraph 12 of this panel’s decision, the “no-sign” allegations sprang from what was, effectively, a survey conducted by the main petitioner while she was circulating her petition. It seems she asked every employee she approached whether he or she had signed a union card. This was information to which she was not entitled. Both the letter and the spirit of the *Labour Relations Act* treat membership decisions as confidential. Indeed, that is one of the supposed benefits of representation votes for which petitioners often clamour. Yet here the petitioner wanted every employee to give up his or her right to keep that decision confidential. It is not surprising that some employees chose not to do so, and protected the confidentiality of their decision in the only way they could: they denied having signed cards when in fact they had signed.

4. I was not surprised at the result of the investigation by the Board Officer. It is

standard operating procedure in a union organizing campaign to advise employees of the possibility of a petition and explain to them the option of avoiding argument by pretending to be neutral, by refusing to sign the petition and claiming not to have signed a card. From the applicant's point of view, this strategy was certainly successful in this case. However, I am concerned at the appearance that nothing more than a survey of this kind is needed to prompt the sort of investigation described in paragraph 21 of the panel's decision in this case. The approach of the Labour Relations Officer can be an embarrassing and disconcerting experience for a recently joined trade union member, even if he is forewarned of the possibility as the employees here may well have been. I was and am satisfied that the petitioner genuinely, and incorrectly, thought the results of her survey revealed some fraud on the Board. I am concerned, however, about the potential for abuse of this type of procedure by parties who may well know that some employees disguise their allegiance and who, even so, conduct the survey and then invoke the Board's aid to complete it in the hope of identifying union supporters or creating an atmosphere in which support for the union is chilled by the need to verify intentions in an interview with a government representative.

5. If a "no-sign" allegation comes before the Board again on the basis of this type of survey, the Board will have to consider carefully whether this will be treated in the future as an adequate basis on which to launch a Board investigation.

0980-83-R United Brotherhood of Carpenters and Joiners of America, Local Union 446, Applicant, v. **Wardet Limited**, Respondent, v. Labourers' International Union of North America, Ontario Provincial District Council, Intervener

Certification – Membership Evidence – Union raising collective agreement as bar to certification application required to establish entitlement to represent at time agreement entered into – Whether Board accepting certificate of membership of member in arrears of dues

BEFORE: R. A. Furness, Vice-Chairman, and Board Members C. A. Ballentine and J. Wilson.

APPEARANCES: *David McKee and Gilbert Scott for the applicant; Steven Bellissimo and Henry Hellwinkel for the respondent; David Strang, Tom Connolly and Dario Disante for the intervener.*

DECISION OF THE BOARD; January 11, 1984

1. The applicant is seeking certification for a bargaining unit of all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Board's geographic area no. 21, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

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3. It was the position of the respondent and the intervener that this application for certification is untimely and ought to be dismissed because an alleged collective agreement between the respondent and the Labourers' International Union of North America, Ontario Provincial District Council on behalf of its affiliated locals covers all employees affected by this application. The alleged collective agreement between the respondent and the intervener became effective on July 7, 1983, and by its terms remains in effect until February 28, 1985. This application for certification was filed on August 4, 1983, and by virtue of the provisions of section 60(3) of the Act, the onus of establishing that the intervener was entitled to represent the employees in the bargaining unit at the time the alleged collective agreement was entered into rests on the parties to the agreement.

4. Article 2.01 of the alleged collective agreement states:

The Employer recognizes the Union as the sole and exclusive bargaining agent for all employees engaged in construction work covered by the classifications in this Agreement within the Province of Ontario, save and except non-working foremen and those above that rank, camp staff, office staff, those employees covered by a subsisting Collective Agreement and engineering staff for Civil Engineering Construction Work, which includes the Sewer and Watermain, Roadbuilding, Heavy Construction Sectors, but excludes Tunnel Work, T.T.C. Rapid Transit System Construction and Utility Work as defined in the Collective Agreement between the Union and The Utility Contractors' Association of Ontario.

At the time of the signing of the alleged collective agreement, the respondent was engaged in performing work in Sault Ste. Marie. Its job was to install sewers in Sault Ste. Marie and to this end it divided its work force into two crews. One crew was engaged in installing fences in preparation for an installation crew to commence installing the services. On the date of the signing of this alleged collective agreement, namely, July 7, 1983, the respondent employed a total of seven labourers and a watchman in Sault Ste. Marie. The applicant argued that on that date the respondent also employed as a labourer R. Kosloski. Having regard to the evidence of Mr. Kosloski's duties, the Board finds that he was an office employee engaged in layout work with occasional work of securing materials with a pickup truck. Having regard to the nature of the work performed, the Board finds that Mr. Kosloski was not employed by the respondent as a construction labourer and was not performing work covered by the alleged collective agreement.

5. The respondent and the intervener have been parties to collective agreements for many years. The respondent is based in Willowdale and when it secured the contract for work in Sault Ste. Marie it took certain of its employees with it from Toronto. The evidence before the Board consisted of records from the intervener's membership computer. With respect to Messrs. H. De Melo, A. Nicolazzo, D. Tino and V. Giorgio, the intervener presented evidence concerning the payment of dues by these individuals. Mr. De Melo's dues were paid up in June of 1983, and the same is true for Mr. Nicolazzo and Mr. Tino. With respect to Mr. Giorgio, he last paid his dues on April 26, 1983. In these circumstances, Mr. Giorgio, according to the evidence supplied by the intervener, would be suspended as of July 7, 1983. The Board heard evidence that Mr. Giorgio would still be considered a member until he was

one year's in arrears in his dues. During his period of suspension he would not be able to vote and would have to pay his monthly dues before being restored to all of the privileges of membership. One of the effects of being in arrears of membership would be that he would not be referred by the intervener for work until his membership dues are fully paid up. However, the intervener does not operate a hiring hall in the sewer and watermain sector and it appears that Mr. Giorgio was transferred by the respondent to the job in Sault Ste. Marie without reference to the intervener.

6. The Board in applications for certification under the construction industry provisions of the Act commonly accepts applications for membership accompanied by receipts and certificates of membership. In the case of certificates of membership, the Board normally requires that the member has paid his monthly dues for one month within the six month period immediately preceding the terminal date of the application. In applying this approach, it is quite clear that the Board would have accepted a certificate of membership signed by Mr. Giorgio even though he was in arrears with respect to his payment of membership dues. The applicant argued that since Mr. Giorgio was a suspended member, then the Board ought not to treat his status within the intervener as establishing entitlement to represent within the meaning of section 60(3) of the Act. It appears to the Board, however, that Mr. Giorgio is still a member of the intervener, albeit, he is not in a position to enjoy all of the privileges of membership. It is quite clear from the evidence that he was not suspended from membership in the applicant. In these circumstances, the Board is prepared to find that Mr. Giorgio was a member in the intervener on July 7, 1983.

7. The evidence presented in this application that the intervener was entitled to represent employees at the time the alleged collective agreement was entered into may well take a different form from the evidence of membership required on an application for certification. As the Board stated in *Spring Plastering Limited*, [1967] OLRB Rep. Dec. 887, "Any documentary evidence of the right of a trade union to represent employees is not necessarily prepared with a view to applying for certification and accordingly the evidence supplied could reflect the desire of the employees to have the union represent them without complying with the stringent tests of membership". In the instant application, there is no doubt that if the intervener had applied for certification and had filed a certificate of membership with respect to Mr. Giorgio, the Board would have accepted the current status of his dues payment as reflected on a certificate of membership as being sufficient evidence of membership to support an application for certification. In these circumstances, the Board finds that the intervener has introduced before the Board evidence of membership with respect to four of the seven persons who were covered by the alleged collective agreement on July 7, 1983. Since the intervener has produced evidence of membership with respect to a majority of these seven employees, the Board is prepared to find that the intervener was entitled to represent the employees in the bargaining unit at the time the collective agreement was entered into.

8. The Board therefore finds that the collective agreement between the respondent and the intervener is a valid collective agreement and that this application is untimely. The collective agreement is a bar to this application for certification.

1278-83-U Baldev Mutta, Complainant, v. United Steelworkers of America, Local 7155, Respondent, v. Waterloo Metal Stampings Ltd., Intervener

Duty of Fair Representation – Practice and Procedure – Unfair Labour Practice – substantial delay in filing complaint – No satisfactory explanation of delay – Resulting in potential prejudice to Union’s position – Complaint not entertained

BEFORE: Kevin M. Burkett, Alternate Chairman.

APPEARANCES: *Eva E. Marszewski for the complainant; Brian Shell, Charlie Wightman, Wilf Bowen and Cecil Wilton for the respondent; D. Jane Forbes-Roberts, Bob Wetloffer and Wayne McMichael for the intervener.*

DECISION OF THE BOARD; January 30, 1984

1. The style of cause in this complaint is amended to show Waterloo Metal Stampings Ltd. as an intervener instead of as a respondent.

2. This is a complaint filed under section 89 of the *Labour Relations Act* alleging a breach of section 68 of the Act; the section which makes it unlawful for a trade union to act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the bargaining unit that it represents. Specifically, it is alleged that:

On or about March 29, 1982 the grievor was dealt with by Charles Wightman, Representative, United Steelworkers of America contrary to the provisions of section 68 of the *Labour Relations Act* in that he did on his own behalf or on behalf of the respondent: fail to adequately prepare for an arbitration hearing held on that date between the Respondent company and the respondent union involving a grievance against the dismissal of the Complainant, did not interview potential witnesses, did not call witnesses to support the Complainant’s position, did not adequately cross-examine the company’s witnesses, did not seek advice or take instructions from the Complainant but instead from Wilfred Boland, President of the Local, and a political opponent of the Complainant, thereby acting in bad faith, and in an arbitrary and discriminatory manner.

3. Both the respondent trade union and the intervener company object to this matter proceeding to a hearing on the merits because of the delay in the filing of the complaint. The alleged breach of the duty of fair representation occurred on March 29, 1982 and the complaint was not filed until September 6, 1983. The matter was adjourned on October 20, 1983, the date scheduled for hearing, following which the respondent made a request for particulars which were delivered on January 16, 1984. The date scheduled for hearing had been set as January 19, 1984. The respondent and the intervener rely on the considerations and criteria found in *Re Corporation of the City of Mississauga*, [1982] OLRB Rep. March 420 and *Sheller-Globe of Canada, Ltd.*, [1982] OLRB Rep. Jan. 113 in support of their request to have the Board exercise its discretion under section 89(4) of the Act to refuse to hear the complaint on its merits. Reference was also made by the respondent trade union to the Board decision in *Stelco Inc.* [1983] OLRB Rep. Dec. 2102, in support of its request. The complainant

also relies on the criteria set out in the above referred to cases and in addition cites *General Motors of Canada Limited*, [1982] OLRB Rep. Feb. 9, *North York General Hospital*, [1982] OLRB REP. Aug. 1190, *The Corporation of the City of Thunder Bay*, [1983] OLRB Rep. May 781, *Caravelle Foods*, [1983] OLRB Rep. June 875, *Conestoga College of Applied Arts & Technology*, [1983] OLRB Rep. June 882 and *Crovac*, [1983] OLRB Rep. June 886, in support of its position that the Board should determine the matter on the merits. The complainant argues that there is justification for the delay, there is no monetary compensation sought by way of remedy, that fading recollection is not an issue in this case given the nature of the relationship between Mr. Mutta, the complainant, and Mr. Bowen, the union president, and that there are compelling labour relations issues raised in this case.

4. The Board rendered an oral decision at the hearing in this matter on January 19, 1984. The Board hereby confirms its oral ruling which was as follows:

- (1) The relevant considerations to be taken into account in deciding whether to exercise our discretion not to inquire into a complaint under the Act which has not been filed promptly are set out at paragraph 22 of the decision of the Board in *The Corporation of the City of Mississauga*, [1982] OLRB Rep. Mar. 420. They are:

- The length of the delay and the reason for it.
- When the complainant first became aware of the alleged statutory violation.
- The nature of the remedy claimed and whether it involves retrospective financial liability or impacts on the pattern of relationships.
- Whether the claim is of such a nature that fading recollection, the unavailability of witnesses, deterioration of records or disposal of records would hamper a fair hearing.

The labour relations policy considerations which underlie the Board's reliance on these criteria are found in *The Corporation of the City of Mississauga*, *supra*, and *Sheller-Globe of Canada, Ltd.*, [1982] OLRB Rep. Jan. 113. In addition, the Board takes into account considerations related to the conduct of a fair hearing.

- (2) For purposes of deciding whether we should exercise our discretion to entertain this complaint on its merits the Board is assuming as proven:
 - (a) The chronology of events as recited by counsel for the complainant including the fact that the arbitration hearing lasted only three hours.
 - (b) The nature of the relationship between Mr. Bowen, the union

president and Mr. Mutta, the complainant, as recited by counsel for the complainant and the conclusion that:

“the relationship between Mr. Mutta and Mr. Bowen was such that Mr. Bowen would not have forgotten the relevant discussions and exchanges.”

- (c) That Mr. Mutta discussed with the union the calling of certain witnesses who would have testified to his past union activities but did not tell anyone from the union in advance of the arbitration hearing that he considered his termination to have been for anti-union reasons.
 - (d) Mr. Mutta advised Mr. Bowen after the release of the arbitration award upholding his discharge that he lost because the union did not really put an effort into the case, never called certain witnesses and never presented medical facts.
- (3) In this complaint, filed on September 6, 1983, the complainant asks the Board to review the conduct of the union in connection with an arbitration hearing conducted on March 29, 1982; some 18 months before the filing of the complaint and some 23 months prior to the commencement of the hearing on January 19, 1984. Accepting that Mr. Mutta conducted himself as he should have up to June 14, 1982 (i.e. applied for legal aid and arranged for a meeting with a lawyer in order to obtain a legal opinion within six weeks), the passage of some 15 months between the date of that meeting and the date of the filing of the complaint can be attributed to his inactivity. Mr. Mutta was asked by his counsel to obtain additional documentation on June 14, 1982. If he had done so with dispatch a legal opinion could have been drafted and the matter either abandoned or pursued some time in the summer of 1982. Mr. Mutta failed to provide the necessary documentation before being called away to India to attend to an urgent personal matter on October 2, for a period of almost 4 months. Although he met with his lawyer again in February/March, no steps were taken to proceed with the matter and in June Mr. Mutta was advised to obtain other counsel. He did so in August and the complaint was filed in September, 1983 even though Mr. Mutta was again in India; this time because of the illness of his mother. The union, therefore, was put on notice for the first time in September, 1983 that it must defend its conduct of an arbitration hearing which it conducted in March, 1982. Having regard to the foregoing, the Board is satisfied that in this case the delay has been substantial and without any compelling reason.
- (4) Furthermore, the relief sought is the relitigation of the complainant's discharge and, if granted, would require the parties to the collective bargaining relationship “to do battle over an individual's rights which

they have both considered no longer an issue in their relationship because of an elapse of time.” (*Caravelle Foods*, [1983] OLRB Rep. June 875).

- (5) Even accepting, as the union maintains, that Mr. Bowen’s powers of recollection would not be impaired, Mr. Wightman, who, on behalf of the union prepared and presented the arbitration that is in issue and who is named in the complaint as the union official who breached the duty of fair representation, disposed of his notes in December, 1982 (some nine months after the hearing). In the absence of any indication to him by Mr. Mutta that his case carried with it broader ramifications (i.e. anti-union motivation) than suggested on the face of the grievance, it must be found that his powers of recollection and conversations which he had in connection with the particular situations (as distinct from the many other grievances and arbitrations that he processes) would have been impaired with the passage of time.
- (6) Having regard to the foregoing, it is our view that an inquiry into this matter at this time, notwithstanding whatever inferences could be drawn from the fact that the arbitration hearing lasted only three hours, carries with it the risk of substantial prejudice to the respondent trade union.
- (7) The complainant submits that the Board should inquire into the merits of the complaint notwithstanding the delay in its filing because it raises compelling labour relations issues, specifically, the failure of a local president to carry out his duties. All section 68 complaints assert a failure on the part of some union official to have carried out his responsibilities as he should have.
- (8) Given the period of delay, the inadequacy of the explanation and the potential for prejudice to the respondent if we were to inquire into the merits, it is the Board’s decision not to exercise the discretionary power given to it under section 89 of the Act to inquire into the merits of this complaint.

5. Having regard to all of the foregoing, this complaint is hereby dismissed.
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2017-83-R Ontario Secondary School Teachers' Federation, Applicant, v. The Board of Education for the City of York, Respondent

Employee – Practice and Procedure – Trade Union Status – Prior decision finding OSSTF having trade union status – Burden on respondent to disprove status in subsequent application – Arbitration award on status of teachers under *SBTCNA* not binding on Board – Agreement between parties that persons not “teachers” not giving Board jurisdiction – Agreement on single location bargaining unit not automatically accepted – Board seeking further evidence on bargaining unit appropriateness and teacher exclusion issues

BEFORE: Owen V. Gray, Vice-Chairman and Board Members W. G. Donnelly and B. L. Armstrong.

APPEARANCES: *George Surdykowski, Marlene E. Miller and Fred W. Birket for the applicant; Paul Jarvis, Paul Martindale, Norman Ahmet and Ian Baker for the respondent.*

DECISION OF THE BOARD; January 19, 1984

1. This is an application for certification. The respondent seeks bargaining rights under the *Labour Relations Act* with respect to a bargaining unit defined as follows:

“All teachers employed by the respondent at Humewood House School, 40 Humewood Drive, in the Municipality of Metropolitan Toronto.”

• • • •

3. At the initial hearing in this matter, the respondent objected to the applicant's status to apply for certification under the *Labour Relations Act* (“the LRA”). The respondent argued that the applicant is not a “trade union” because it has as members, and presumably was founded by, persons to whom the LRA does not apply by virtue of section 2(f) of that Act, which reads as follows:

2. This Act does not apply,

• • • •

(f) to a teacher as defined in the *School Boards and Teachers Collective Negotiations Act*, except as provided in that Act.

The respondent further argues that the *School Boards and Teachers Collective Negotiations Act* (“the *SBTCNA*”) provides that principals and vice-principals of schools are to be members of and included in bargaining units represented by branch affiliates of OSSTF in bargaining under that Act. The respondent says that principals and vice-principals exercise managerial functions and are employed in a confidential capacity in matters relating to labour relations within the meaning of section 1(3)(b) of the LRA. Where such persons are included in the membership of an association, the jurisprudence of this Board is said to preclude a finding that such an association is a “trade union” within the meaning of section 1(1)(p) of the LRA. The “managerial” character of a principal's duties would come clear, we were told,

from a review of the SBTCNA, *The Education Act*, R.S.O. 1980 c.129, as amended, and Regulations thereunder.

4. In *The Board of Education for the Borough of Scarborough*, [1983] OLRB Rep. Nov. 1889, the Board found that the OSSTF was a “trade union” within the meaning of section 1(1)(p) of the LRA. The parties to that proceeding, however, had agreed that principals are “employees” within the meaning of the *Labour Relations Act*; the panel of the Board which decided that case heard no argument that principals and vice-principals exercise “managerial functions” within the meaning of section 1(3)(b) of the Act. The respondent in this case therefore argued that it was open to the Board to reconsider the matter of the applicant’s status and, further, that the onus fell on the applicant to prove it had that status. On that issue, the Board ruled that section 105 of the LRA was applicable, with the result that the burden of disproving the applicant’s status fell on the respondent.

5. Although we heard argument from both parties with respect to these issues, neither party cited any authorities other than those referred to in the *Scarborough Board of Education* case referred to above. Neither counsel cited or reviewed any authorities establishing or limiting any of the propositions advanced by either of them, save as just indicated. Counsel were unable to provide the Board with statutory references at the time of the hearing; these were filed later by mail.

6. Counsel for the respondent declined the opportunity to call any evidence on this issue. Counsel for both parties did agree on the fact that in the City of York, principals participate on the respondent’s negotiating committee when it deals with trade unions other than the OSSTF in bargaining and dealing with teacher’s aids, secretaries and other non-teachers.

7. At the conclusion of the argument on status, the Board asked how it was that the “teachers” who are the subject of this application were not covered by the SBTCNA. This question was prompted, in part, by the following reference in paragraph 7 of the application for certification:

The teachers covered by this application have been found by a Board of Arbitration composed of Ross Kennedy, Jack Baker and Douglas Knoww (dissenting) not to be covered by the subsisting collective agreement between the OSSTF District 14 and the Respondent, entered pursuant to the School Boards and Teachers Collective Negotiations Act.

8. Counsel for both parties agreed that the employees covered by this application are not “teachers” within the meaning of the SBTCNA. We were told that these employees teach in a program established under section 15 of the “General Legislative Grants” regulation made under *The Education Act* (currently O. Reg. 221/83). The parties said that these teachers therefore do not possess all the attributes required by the definition of “teacher” in the SBTCNA.

9. The Ontario Labour Relations Board has no jurisdiction to entertain this certification application if the employees for whom the applicants seeks bargaining rights are “teachers” within the meaning of the SBTCNA. The agreement of the parties cannot give us a jurisdiction which we do not otherwise have. The applicant’s agreement that these are not “teachers” within the meaning of the SBTCNA may be the practical consequence of a binding

arbitration decision to that effect. We are not bound by the Kennedy award, nor does that award give us a jurisdiction which we do not otherwise have. Having now had an opportunity to review the statutes, regulations and authorities referred to in argument, as well as other authorities in the area, we are in doubt whether we have jurisdiction to entertain this application, having regard to section 2(f) of the LRA. We require the further assistance of the parties, upon whom we will have to rely to provide us with the factual foundation necessary to make our own judgement with respect to this issue.

10. If the Board does have jurisdiction, it is concerned whether it has sufficient information to determine the appropriateness of the bargaining unit proposed by the applicant and the respondent. We have no evidence before us whether the “teachers” at Humewood House are the only “teachers” engaged in section 15 programs to which the respondent supplies teachers. Having regard to this Board’s usual approach to collective bargaining between school boards and “non-teachers”, we require the further assistance of the parties to provide us with the factual foundation on which we can satisfy ourselves that a bargaining unit for a single location is appropriate in the circumstances. If it is not, other questions may emerge concerning the community of interest shared by these non-SBTCNA “teachers” and other “teachers” excluded from the operation of the SBTCNA.

11. In short, we are not prepared to accept the parties’ agreement either as to the Board’s jurisdiction or as to the definition of the appropriate bargaining unit. As the evidence and argument to be heard with respect to those matters may affect our final determination on the question of the status of the applicant, that issue will remain reserved until we have heard the necessary evidence and argument.

12. This application will be re-listed for further hearing. It would assist the Board if the parties in the best position to do so would file with the Board, prior to the hearing, sufficient copies of the following:

- (1) the applicant’s constitution and by-laws;
- (2) the current collective agreement between the respondent and District 14 of the applicant;
- (3) the current agreement between the respondent and Humewood House with respect to the section 15 program in question;
- (4) the full text of the regulation under the *Teaching Profession Act* which is referred to in applicants’ counsel’s letter to the Board of December 20, 1983; and,
- (5) any other document upon which either party intends to rely in connection with the issues outlined above.

13. The matter is referred to the Registrar.
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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING DECEMBER 1983

BARGAINING AGENTS CERTIFIED

No Vote conducted

0019-82-R: International Ladies Garment Workers' Union, (Applicant) v. Apple Bee Shirts Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (88 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0120-83-R: United Steelworkers of America, (Applicant) v. Service Employees International Union and Service Employees Union, Local 204, (Respondents) v. Employee, (Objector).

Unit #1: "all employees of the respondents in Ontario engaged in the business of Local 204 save and except supervisors, persons above the rank of supervisor, office and clerical staff, and students employed during the school vacation period." (15 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all office and clerical employees of the respondents in Ontario engaged in the business of Local 204, save and except office manager and accountant, persons above the rank of office manager and accountant, persons employed for not more than twenty-four hours per week and students employed during the school vacation period." (19 employees in unit). (*Having regard to the agreement of the parties*).

0294-83-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. International Harvester Canada Limited, (Respondent).

Unit: "all employees of the Respondent employed at its Chatham Plant, save and except supervisors, persons above the rank of supervisor, Project Engineer I & II, Timestudy Planner, Timestudy Observer I & II, Process Planner I & II/Industrial Engineering, Employee Insurance and Benefits Coordinator, Industrial Nurse, Principal Plant Equipment Designer, Cashier, Industrial Relations Clerk, Product Development Engineer, Wage & Salary Administration/Analyst, Plant Layout Designer, Financial Planning Coordinator, Warranty Reliability & Fleet Supervisor, Secretary-Stenographer to Manager Human Resources, Secretary-Stenographer to Manager Manufacturing Engineering, Secretary-Stenographer to Manager Product Engineering, Secretary to Plant Executive, Secretary to Plant Manager, Security Sergeants, Assistant to Cashier, Budget Control Analyst, Chief of Customs, Engineer, Employee Relations Department Personnel, Materials Handling Analyst, Plant Protection Personnel, Principal Time Study Planner, Production Research Investigator I & II, Progressive Students, Secretary to Chief Product Engineer, Secretary to Manager Industrial Engineering, Standard Data and Methods Time Measurement Coordinator, Tabulating Supervisor Plant, Time Study Trainee, Chief of Traffic, University Undergraduates Warranty Analyst, and persons covered by subsisting collective agreements. (78 employees in unit). (*Clarity Note*).

0642-83-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Lear Siegler Industries Limited, General Seating Division, (Respondent).

Unit: “all office, clerical and technical employees of the respondent in the City of Kitchener, save and except supervisors, those above the rank of supervisor, co-ordinator – employment, secretary to the general sales manager and director of purchasing, cost analyst, general accountants, technologists – industrial engineering, sales representatives, the industrial relations department excluding benefits co-ordinator and first aid attendants, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, students employed on a co-operative training programme and employees covered by the subsisting collective agreements with Local 1524 of the United Automobile Workers”. (39 employees in unit). (*Having regard to the agreement of the parties*).

1297-83-R: Canadian Union of Public Employees, (Applicant) v. Niagra Retirement Manor Inc., (Respondent).

Unit #1: “all employees of the respondent in its retirement home in the City of St. Catharines, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (13 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: (*See Bargaining Agents Certified Subsequent to a Post Hearing Vote.*)

1317-83-R: United Food and Commercial Workers, International Union, AFL, CIO, CLC, (Applicant) v. F. B. I. Foods Ltd., Processing Division, (Respondent) v. Employee, (Objector).

Unit: “all employees of the respondent at its plant in Trenton, save and except forepersons and those above the rank of forepersons, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period.” (3 employees in unit).

1339-83-R: United Brotherhood of Carpenters and Joiners of America, Local 2486, (Applicant) v. Dalron Construction Limited, (Respondent).

Unit #1: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

Unit #2: “all carpenters and carpenters’ apprentices in the employ of the respondent within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

1436-83-R: United Brotherhood of Carpenters and Joiners of America Local 1669, (Applicant) v. Canadian Mine Enterprises Ltd. and Cameron McMyynn Contracting Ltd., (Respondents) v. International Union of Operating Engineers, Local 793, (Intervener #1) v. Labourers International Union of North America, Ontario Provincial District Council and Labourers International Union of North America, Local 607, (Intervener #2) v. United Steelworkers of America, (Intervener #3).

Unit #1: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (133 employees in unit).

Unit #2: “all carpenters and carpenters’ apprentices in the employ of the respondent, in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (133 employees in unit).

1451-83-R: Ironworkers District Council of Ontario, (Applicant) v. Canadian Mine Enterprises Ltd. and Cameron McMyynn Contracting Ltd., (Respondent) v. United Steelworkers of America, (Intervener

#1) v. Labourers International Union of North America, Ontario Provincial District Council and Labourers International Union of North America, Local 607, (Intervener #2) v. International Union of Operating Engineers, Local 793, (Intervener #3).

Unit #1: "all reinforcing rodmen in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (16 employees in unit).

Unit #2: "all reinforcing rodmen in the employ of the respondent in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (16 employees in unit).

1454-83-R: Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Applicant) v. Riverside Acres of Timmins Limited, carrying on business as Peachy's Pizza Parlor, (Respondent).

Unit #1: "all employees of the respondent at Timmins, save and except assistant managers, those above the rank of assistant manager, office staff, and persons employed for not more than twenty-four (24) hours per week." (17 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent at Timmins, employed for not more than twenty-four (24) hours per week, save and except assistant managers, those above the rank of assistant manager, and office staff." (6 employees in unit). (*Having regard to the agreement of the parties*).

1456-83-R: Canadian Paperworkers Union, (Applicant) v. Cooper Corrugated Containers Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Rexdale, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (14 employees in unit).

1471-83-R: Labourers' International Union of North America, Ontario Provincial District Council, (Applicant) v. 515112 Ontario Limited C.O.B. as Bluebird Construction, (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (23 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (23 employees in unit).

1487-83-R: Ironworkers District Council of Ontario, (Applicant) v. 515112 Ontario Limited c.o.b. as Bluebird Construction, (Respondent).

Unit #1: "all reinforcing rodmen in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in unit).

Unit #2: "all reinforcing rodmen in the employ of the respondent in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foremen." (8 employees in unit).

1489-83-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. 515112 Ontario Limited c.o.b. as Bluebird Construction, (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (14 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (14 employees in unit).

1557-83-R: National Association of Broadcast Employees and Technicians (NABET), (Applicant) v. Pathe Video Inc. A subsidiary of Astral Bellevue – Pathe Inc., (Respondent).

Unit #1: "all employees of the respondent in the Metropolitan Toronto, save and except manager and persons above the rank of manager, lab supervisor, shipping/receiving supervisor, quality control supervisor, office, clerical and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (34 employees in unit).

Unit #2: (*See Applications for Certification Dismissed – No Vote Conducted*).

1574-83-R: Canadian Union of Public Employees, (Applicant) v. The Regional Municipality of Niagara, (Respondent).

Unit: "all office and clerical employees of the Regional Municipality of Niagara in its homes for the aged in the Regional Municipality of Niagara, save and except chief clerks, administrators, persons above the rank of administrator and employees covered by subsisting collective agreements." (15 employees in unit). (*Having regard to the agreement of the parties*).

1665-83-R: United Food & Commercial Workers International Union Local 175, (Applicant) v. Central I.G.A., Fort Erie, (Respondent).

Unit #1: "all employees of the respondent in Fort Erie, Ontario, save and except store manager, meat department employees, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period." (13 employees in unit).

Unit #2: "all employees of the respondent in Fort Erie, Ontario regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except store manager." (7 employees in unit).

1666-83-R: United Food & Commercial Workers International Union Local 633, (Applicant) v. Central I.G.A., Fort Erie, (Respondent).

Unit: "all meat department employees of the respondent in Fort Erie, Ontario, save and except the store manager, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (6 employees in unit).

1699-83-R: Ontario Public Service Employees Union, (Applicant) v. The Corporation of the Town of Bracebridge, (Respondent).

Unit: "all office, clerical and technical employees of the respondent at Bracebridge, Ontario, save and except the municipal clerk, the municipal treasurer, persons above the rank of municipal clerk and municipal treasurer, assistant to the municipal clerk and municipal treasurer, chief building inspector, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period." (12 employees in unit).

1764-83-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada Local 105 – London, (Applicant) v. Premier Operating Corporation, (Respondent).

Unit: "all projectionists in the employ of the respondent at the Park Theatre and Mustang Drive-In Theatre in Goderich, Ontario, save and except manager projectionists and those above the rank of manager projectionist." (4 employees in unit). (*Having regard to the agreement of the parties*).

1769-83-R: Labourers' International Union of North America, Local 527, (Applicant) v. J. Sousa Contractors Limited, (Respondent) v. The International Union of Bricklayers & Allied Craftsmen Local #10, (Intervener).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in unit).

1780-83-R: Southern Ontario Newspaper Guild, Local 87, The Newspaper Guild, CLC, ALF, CIO, (Applicant) v. The Expositor, A Division of Southam Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Brantford, Ontario employed in the circulation department, save and except circulation manager, sales manager circulation, circulation supervisor, persons above the rank of circulation manager, sales manager circulation and circulation supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (10 employees in unit). (*Having regard to the agreement of the parties*).

1834-83-R: Peel Block Workers Association, (Applicant) v. Peel Forwarding Limited, (Respondent).

Unit: "all employees of the respondent in Brampton, Ontario, save and except foreman, persons above the rank of foreman, and office and sales staff." (10 employees in unit).

1846-83-R: Service Employees Union, Local 204, affiliated with the AFL, CIO, CLC, (Applicant) v. Baron Metal Industries Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (26 employees in unit). (*Having regard to the agreement of the parties*).

1848-83-R: Canadian Marine Officers Union, (Applicant) v. Contrast Shipping Line Management Inc., (Respondent).

Unit: "all licensed engineers employed by Contrast Shipping Line Management Inc. on board the M. V. Caribbean Trailer." (3 employees in unit).

1852-83-R: Union of Linwo Employees, (Applicant) v. Linwo Industries Limited, (Respondent).

Unit: "all employees of Linwo Industries Limited employed at its plant at Agincourt save and except foremen, persons above the rank of foreman, office workers and sales staff." (100 employees in unit). (*Having regard to the agreement of the parties*).

1865-83-R: Canadian Merchant Service Guild, (Applicant) v. Contrast Shipping Line Management Inc., (Respondent).

Unit: "all Navigation Officers employed by the respondent Company on the vessel owned, operated, manned or chartered by the company." (2 employees in unit).

1905-83-R: Canada Investment Castings Employees' Association, (Applicant) v. Canada Investment Castings Inc., (Respondent).

Unit: "all employees of the respondent at the Town of Elmira in the Township of Woolwich, Regional Municipality of Waterloo, below rank of foreman and excluding office, clerical and technical staff, dispatchers, students employed during the school vacation period, and persons regularly employed for not more than 24 hours per week." (12 employees in the unit).

1906-83-R: Retail Clerks Union, Local 1977, chartered by the United Food and Commercial Workers International Union, CLC, AFL, CIO, (Applicant) v. Zehrs Markets, a Division of Zehrmart Limited, (Respondent).

Unit: "all employees of the respondent at its retail store in Elmira, Ontario save and except the store manager and persons above the rank of store manager." (42 employees in unit). (*Having regard to the agreement of the parties*).

1925-83-R: Ontario Public Service Employees Union, (Applicant) v. Jerome Alexander Ambulance Service Limited operating as Greater Welland Ambulance Service, (Respondent).

Unit: "all employees of the respondent at Welland, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office and clerical staff." (7 employees in unit). (*Having regard to the agreement of the parties*).

1936-83-R: United Electrical, Radio and Machine Workers of America (UE), (Applicant) v. Aerofin Corporation (Canada) Limited, (Respondent).

Unit: "all office and clerical employees of the respondent in Gananoque, Ontario, save and except supervisors, persons above the rank of supervisor, secretary to the vice-president and persons covered by a subsisting collective agreement between the respondent and the United Electrical, Radio and Machine Workers of America, (UE)." (5 employees in unit). (*Having regard to the agreement of the parties*).

1938-83-R: Health, Office & Professional Employees a Division of Local 206, Retail, Commercial & Industrial Union, chartered by the United Food and Commercial Workers International Union, CLC, AFL, CIO, (Applicant) v. Knollcrest Lodge, (Respondent).

Unit: "all employees of the respondent at Milverton, Ontario save and except supervisors, persons above the rank of supervisor, registered and graduate nurses and office staff." (49 employees in unit). (*Having regard to the agreement of the parties*).

1951-83-R: Canadian Union of Public Employees, (Applicant) v. The Corporation of the Town of Oakville, (Respondent).

Unit: "all employees regularly employed for not more than twenty-four hours per week and students employed during the school vacation period of The Corporation of the Town of Oakville employed in its transit department, save and except foremen, persons above the rank of foreman, and office staff." (7 employees in unit). (*Having regard to the agreement of the parties*).

1960-83-R: Food and Service Workers of Canada, (Applicant) v. Edwards Books & Art Limited, (Respondent).

Unit #1: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except manager, persons above the rank of manager, office staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (10 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent in the Municipality of Metropolitan Toronto employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except manager, persons above the rank of manager, and office staff." (10 employees in unit). (*Having regard to the agreement of the parties*).

1964-83-R: Alliance Employees' Union, (Applicant) v. Public Works Component of PSAC, (Respondent).

Unit: “all employees of the respondent in the City of Ottawa, Ontario, save and except administrative co-ordinator and elected officers.” (3 employees in unit). (*Having regard to the agreement of the parties*).

1965-83-R: Canadian Union of Public Employees, (Applicant) v. Bestview Holdings Limited, (Respondent).

Unit #1: “all employees of the respondent in the Town of Oakville, Ontario, save and except the administrator, secretary to the administrator, registered and graduate nurses, supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (8 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: “all employees of the respondent in the Town of Oakville, Ontario regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except the administrator, secretary to the administrator, supervisors and persons above the rank of supervisor.” (5 employees in unit). (*Having regard to the agreement of the parties*).

1966-83-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local 304, (Applicant) v. Schenker Warehousing, A Division of Schenker Warehousing, A Division of Schenker of Canada Ltd., (Respondent).

Unit: “all office and clerical employees of the respondent in the City of Mississauga, save and except office supervisor, persons above the rank of office supervisor, and secretary to the office manager.” (14 employees in unit). (*Having regard to the agreement of the parties*).

2028-83-R: Retail Clerks Union, Local 1977, chartered by the United Food and Commercial Workers International Union CLC, AFL, CIO, (Applicant) v. Zehrs Markets, a division of Zehrmart Limited, (Respondent).

Unit: “all employees of the respondent at its retail store in Goderich, Ontario, save and except store manager and persons above the rank of store manager.” (54 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

2029-83-R: Energy and Chemical Workers Union, (Applicant) v. Southern Wood Products Limited, (Respondent).

Unit: “all employees of the respondent in Petrolia, Ontario, save and except foremen and those above the rank of foremen, office and clerical staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period.” (52 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

2060-83-R: International Ladies’ Garment Workers’ Union, (Applicant) v. S. R. Gent (Canada) Inc., (Respondent).

Unit: “all employees of the respondent at Mississauga, Ontario, save and except line supervisors, persons above the rank of line supervisor, office and sales staff, mechanics, designers, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (127 employees in unit). (*Having regard to the agreement of the parties*).

2063-83-R: Energy and Chemical Workers Union, (Applicant) v. Swissplas Limited. (Respondent).

Unit: “all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and clerical staff, students employed during the school vacation period, and persons regularly employed for not more than twenty-four (24) hours per week.” (20 employees in unit). (*Having regard to the agreement of the parties*).

2064-83-R: Local 47 Sheet Metal Workers' International Association, (Applicant) v. McKissock Roofing Limited, (Respondent).

Unit #1: "all employees of the respondent engaged in roofing in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in unit).

Unit #2: "all employees of the respondent engaged in roofing in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in unit).

2095-83-R: Labourers' International Union of North America, Local 183, (Applicant) v. Tribute Homes Limited, (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

2103-83-R: International Brotherhood of Painters and Allied Trades, Local Union 1891, (Applicant) v. Lauderhill Painting & Decorating Co., (Respondent).

Unit #1: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in unit).

Unit #2: "all painters and painters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in unit).

2105-83-R: Local 47 Sheet Metal Workers' International Association, (Applicant) v. Ontario Glass Craftsman, (Respondent).

Unit #1: "all journeymen sheet metal workers and sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry, in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all journeymen sheet metal workers and sheet metal apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

1721-83-R: International Ladies' Garment Workers' Union, (Applicant) v. Sportswear City Limited, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office and sales staff, mechanics, designers, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (101 employees in unit).

Number of names of persons on revised voters' list		104
Number of persons who cast ballots	93	
Number of ballots marked in favour of applicant		65
Number of ballots marked against applicant		27
Ballots segregated and not counted		1

1816-83-R: Canadian Union of Public Employees, (Applicant) v. Sudbury Memorial Hospital, (Respondent) v. Ontario Public Service Employees Union, (Intervener).

Unit: "all employees of the respondent at its Hospital in Sudbury, Ontario, who are regularly employed for not more than 24 hours per week save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, technical personnel, supervisors and foremen, persons above the rank of supervisors or foreman, chief engineer, office and clerical staff, students employed during the school vacation period and those covered by subsisting collective agreements." (70 employees in unit).

Number of names of persons on list as originally prepared		82
Number of persons who cast ballots	53	
Number of ballots marked in favour of applicant		38
Number of ballots marked against applicant		15

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

2339-82-R: Lumber and Sawmill Workers' Union, Local 2995 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. BioShell Inc., (Respondent) v. Canadian Paperworkers Union, (Intervener) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Nellie Lake, Ontario, save and except foremen, those above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (20 employees in unit).

Number of names of persons on revised voters' list		19
Number of persons who cast ballots	18	
Number of ballots marked in favour of applicant		7
Number of ballots marked in favour of intervener		11

1078-83-R: Canadian Union of Operating Engineers & General Workers, (Applicant) v. Riverside Hospital of Ottawa, (Respondent) v. Employee, (Objector).

Unit: "all clerical staff of the respondent save and except supervisors, persons above the rank of supervisor and persons covered by subsisting collective agreements." (57 employees in unit).

Number of names of persons on revised voters' list		58
Number of persons who cast ballots	43	
Number of ballots marked in favour of applicant		31
Number of ballots marked against applicant		12

1149-83-R: Canadian Union of Public Employees, (Applicant) v. St. Joseph Nursing Home (Rockland) Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent at Rockland, Ontario, save and except professional medical staff, graduate nursing staff, undergraduate nursing staff, supervisors, persons above the rank of supervisor and technical and office staff." (29 employees in unit).

Number of names of persons on revised voters' list		29
Number of persons who cast ballots	28	
Number of ballots marked in favour of applicant		15
Number of ballots marked against applicant		13

Unit #2: (*See Applications for Certification Dismissed Subsequent to a Post-Hearing Vote*).

1297-83-R: Canadian Union of Public Employees, (Applicant) v. Niagara Retirement Manor Inc., (Respondent).

Unit #1: (*See Bargaining Agents Certified – No Vote Conducted*).

Unit #2: "all employees of the respondent in its retirement home in the City of St. Catharines regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period, save and except supervisors and persons above the rank of supervisor." (12 employees in unit).

Number of names of persons on revised voters' list		11
Number of persons who cast ballots	11	
Number of ballots marked in favour of applicant		9
Number of ballots marked against applicant		1
Ballots segregated and not counted		1

Applications for Certification Dismissed – No Vote Conducted

2482-82-R: United Brotherhood of Carpenters and Joiners of America, (Applicant) v. T and F Construction Equipment Rental Limited, (Respondent) v. Labourers' International Union of North America, Local 183, (Intervener #1) v. The Form Work Council of Ontario, (Intervener #2). (12 employees in unit).

2705-82-R: Retail Clerks Union Local 409, (Applicant) v. Dominion Stores Limited, (Respondent) v. Canada Safeway Limited, (Intervener). (4 employees in unit).

1557-83-R: National Association of Broadcast Employees and Technicians (NABET), (Applicant) v. Pathe Video Inc., a subsidiary of Astral Bellevue – Pathe Inc., (Respondent).

Unit #1: (*See Bargaining Agents Certified – No Vote Conducted*).

Unit #2: "all employees of the respondent regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except manager, persons above the rank of manager, office, clerical and sales staff." (6 employees in unit).

1998-83-R: United Food & Commercial Workers International Union, Local 725A, (Applicant) v. Wheels Inn, Chatham, (Respondent). (289 employees in unit).

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

1742-83-R: United Steelworkers of America, (Applicant) v. Mitten Vinyl Inc., (Respondent).

Unit: "all employees of the respondent in the City of Cambridge, save and except foremen, persons above the rank of foreman, office and sales staff." (138 employees of unit).

Number of names of persons on revised voters' list		138
Number of persons who cast ballots	131	
Number of ballots marked in favour of applicant		44
Number of ballots marked against applicant		87

1926-83-R: Canadian Union of Public Employees, (Applicant) v. Kenora-Keewatin District Association for the Mentally Retarded, (Respondent).

Unit: all employees of the respondent at Kenora, Keewatin and Jaffray-Melick Township, save and except directors, persons above the rank of director and the confidential secretary to the administrator.” (40 employees union).

Number of names of persons on list as originally prepared		39
Number of persons who cast ballots	39	
Number of ballots marked in favour of applicant		19
Number of ballots marked against applicant		20

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

1049-83-R: International Association of Machinists and Aerospace Workers, (Applicant) v. G & B Automated Equipment Ltd., (Respondent).

Unit: “all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, and students employed during the school vacation period.” (44 employees in unit).

Number of names of persons on list as originally prepared		17
Number of persons who cast ballots	17	
Number of ballots marked in favour of applicant		5
Number of ballots marked against applicant		12

1149-83-R: Canadian Union of Public Employees, (Applicant) v. St. Joseph Nursing Home (Rockland) Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: (*See Bargaining Agents Certified Subsequent to a Post-Hearing Vote*).

Unit #2: “all employees of the respondent at Rockland, Ontario regularly employed for not more than twenty-four hours per week or less and students employed during the school vacation period, save and except professional medical staff, supervisors, persons above the rank of supervisor and technical and office staff.” (30 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters’ list		32
Number of persons who cast ballots	30	
Number of ballots marked in favour of applicant		11
Number of ballots marked against applicant		13

1452-83-R: United Brotherhood of Carpenters and Joiners of America Local 2679, (Applicant) v. Pihurst Woodworking Company Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent at Brampton, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period.” (34 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters’ list		40
Number of ballots excluding segregated ballots cast by persons whose name appear on voters’ list		37
Number of ballots marked in favour of applicant	6	
Number of ballots marked against applicant		29
Ballots segregated and not counted		2

1735-83-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Applicant) v. The Prestco Company of Canada Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Town of Markham, Ontario, save and except service supervisor, persons above the rank of service supervisor, office and sales staff, persons employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (12 employees in unit).

Number of names of persons on list as originally prepared by employer	11
Number of persons who cast ballots	11
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	6

1784-83-R: United Steelworkers of America, (Applicant) v. Bell-White Analytical Laboratories Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Town of Haileybury in the District of Timiskaming, save and except foremen, persons above the rank of foreman, office and sales staff, students employed during the school vacation period and persons regularly employed for not more than twenty-four hours per week." (13 employees in the unit).

Number of names of persons on list as originally prepared	10
Number of persons who cast ballots	10
Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	10

APPLICATIONS FOR CERTIFICATION WITHDRAWN

1424-83-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Applicant) v. Toronto (Harbour Castle) Hilton Hotel A Division of Cam-peau Corporation, (Respondent).

1437-83-R: United Steelworkers of America, (Applicant) v. Cameron McMynn Contracting Limited, and Canadian Mine Services Limited, (Respondents) v. International Union of Operating Engineers, Local 793, (International #1) v. Labourers International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 607, (Intervener #2) v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Local Union 128, (Intervener #3) v. The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 128, (Intervener #3) v. The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 508, (Intervener #4) v. United Brotherhood of Carpenters and Joiners of America, Local 1669, (Intervener #5) v. Local Union 402, International Brotherhood of Electrical Workers, (Intervener #6) v. Sheet Metal Workers' International Association, Local Union 397, (Intervener #7).

1439-83-R: Labourers' International Union of North America, Ontario Provincial District Council, (Applicant) v. Canadian Mine Services Limited, and Cameron McMynn Contracting Ltd., (Respondents) v. United Steelworkers of America, (Intervener).

1715-83-R: United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. Roch Cayer, (Respondent).

1730-83-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, (Applicant) v. Centre for Applied Research and Engineering Design Incorporated, (Respondent).

1763-83-R: International Brotherhood of Electrical Workers Local Union 105, (Applicant) v. Centre for Applied Research and Engineering Design Incorporated, (Respondent).

1794-83-R: Sheet Metal Workers' International Association, Local Union 537, (Applicant) v. Centre for Applied Research and Engineering Design Incorporated, (Respondent).

1924-83-R: Hotel Employees Restaurant Employees Union, Local 75, (Applicant) v. Saga Foods Canadian Management Service Ltd., (operating at Wilson Hall, Wetmore Hall, Gnu Deli – New College), (Respondent).

1935-83-R: Christian Labour Association of Canada, (Applicant) v. Collins Electric Services (1979) Ltd., (Respondent).

1971-83-R: The United Brotherhood of Carpenters and Joiners of America, Local 18, (Applicant) v. McMaster University, (Respondent).

2003-83-R: Laundry & Linen Drivers and Industrial Workers, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Pestco Company of Canada Ltd., (Respondent).

2004-83-R: International Union of Operating Engineers, Local 793, (Applicant) v. Rumble Contracting Limited, (Respondent).

2129-83-R: United Brotherhood of Carpenters and Joiners of America, Local 93, (Applicant) v. Macam Construction Limited, (Respondent).

2171-83-R: United Brotherhood of Carpenters & Joiners of America, Local 1256, (Applicant) v. Wilding Industrial Doors Limited, (Respondent).

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

0304-83-R: United Brotherhood of Carpenters and Joiners of America, Local 494, (Applicant) v. Arbis Construction Ltd., Tony Azar Construction, Tony Azar Construction Limited, (Respondents). (*Dismissed*).

1039-83-R: Sheet Metal Workers' International Association, Local Union 47, (Applicant) v. Aluminum Specialties (Ottawa) Limited, Aluminum Specialties Ontario Limited, and Duron Ottawa Ltd., (Respondents). (*Withdrawn*).

1340-83-R: United Brotherhood of Carpenters and Joiners of America, Local 2486, (Applicant) v. Dalron Construction Limited, Dave Arnold Realty Limited carrying on business as Dalron Homes, and Penage Construction Limited, (Respondents). (*Withdrawn*).

1587-83-R: United Brotherhood of Carpenters and Joiners of America, Local 1316, (Applicant) v. Wm. J. Broome Ltd., Merit Drywall & Acoustics Ltd., Central Drywall & Acoustics Company, (Respondents). (*Granted*).

1623-83-R: United Brotherhood of Carpenters and Joiners of America, Local 446, (Applicant) v. Fin-can Construction Company Ltd., Tuomi Brothers Company Ltd. and 562110 Ontario Inc. carrying on business under the name and style of Tuomi 83 General Contractors, (Respondents). (*Granted*).

1624-83-R: United Brotherhood of Carpenters and Joiners of America, Local 446, (Applicant) v. 499168 Ontario Inc., Operating as Taurus Construction and Benbee Diving & Marine Ltd., (Respondent). (*Withdrawn*).

1743-83-R: Labourers' International Union of North America, Local 1089, (Applicant) v. Jafco Construction Ltd. and 545439 Ontario Inc. c.o.b. under the firm name and style of St. Clair Construction, (Respondents). (*Granted*).

1773-83-R: Labourers' International Union of North America, Local 1059, (Applicant) v. Joe Franze Concrete Ltd., (Respondent). (*Dismissed*).

SALE OF A BUSINESS

0303-83-R: United Brotherhood of Carpenters and Joiners of America, Local 494, (Applicant) v. Arbis Construction Ltd., Tony Azar Construction, Tony Azar Construction Limited, (Respondents). (*Dismissed*).

1040-83-R: Sheet Metal Workers' International Association, Local 47, (Applicant) v. Aluminum Specialties (Ottawa) Limited, Aluminum Specialties Ontario Limited, and Duron Ottawa Ltd., (Respondent). (*Withdrawn*).

1616-83-R: Graphic Communications International Union, Local 28-B, (Applicant) v. Don Mills Bindery Inc., (Respondent) v. Thorn Press Limited, (Intervener). (*Granted*).

1737-83-R: Ontario Council of the International Brotherhood of Painters and Allied Trades, (Applicant) v. Wm. J. Broome Ltd. and Central Drywall & Acoustics Company, (Respondent). (*Granted*).

1743-83-R: Labourers' International Union of North America, Local 1089, (Applicant) v. Jafco Construction Ltd. and 545439 Ontario Inc. c.o.b. under the firm name and style of St. Clair Construction, (Respondents). (*Granted*).

1920-83-R: United Steelworkers of America, (Applicant) v. MacKenzie, Milne Industrial Hardware and Equipment and MacKenzie, Milne and Co. Ltd., (Respondent). (*Withdrawn*).

UNION SUCCESSOR RIGHTS

2005-83-R: Ontario Public Service Employees Union, (Applicant) v. The Norfolk Board of Education, (Respondent). (*Granted*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1207-83-R: Edmund Northcott & A Group K-Mart Employees, (Applicant) v. Teamsters Local 419, (Respondent) v. K Mart Canada Limited, (Intervener). (44 employees in unit). (*Dismissed*)

1606-83-R: Nishan Atikian, (Applicant) v. International Association of Machinists & Aerospace Workers, (Respondent) v. Treco Machine & Tool Limited, (Intervener).

Unit: "all employees of the intervener in the Borough of Scarborough, save and except foremen, persons above the rank of foreman, office and sales staff, production control clerks, new employees on probation, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (76 employees in unit). (*Granted*)

Number of names of persons on list as originally prepared		76
Number of persons who cast ballots	74	
Number of spoiled ballots		1
Number of ballots marked in favour of respondent		15
Number of ballots marked against respondent		58

1625-83-R: John Erdman, (Applicant) v. Millworkers Local 802 – United Brotherhood of Carpenters and Joiners of America, (Respondent) v. Industrial Fabricators (Division of 395660 Ontario Limited), (Intervener).

Unit: “all employees of the intervener at 175 Industry Road, Kingsville, Ontario, save and except assistant foremen, persons above the rank of assistant foreman, office workers, and timekeepers.” (5 employees in unit). (*Granted*) (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared		5
Number of persons who cast ballots	5	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		5

1766-83-R: Harris Licis, (Applicant) v. Teamsters Local Union No. 419, (Respondent) v. T. Puckrin & Son Ltd., (Intervener). (15 employees in unit). (*Dismissed*).

1767-83-R: Philip Jeffries & Linda Dobbin, (Applicant) v. United Steelworkers of America, (Respondent). (57 employees in unit). (*Dismissed*).

1831-83-R: Employees of the Southwestern Regional Library System, (Applicant) v. Canadian Union of Public Employees, and its Local Union 543-R, (Respondent).

Unit: “all employees of the respondent in Windsor, Ontario, save and except the Director and persons regularly employed for not more than 24 hours per week.” (2 employees in unit). (*Granted*).

2016-83-R: Fred Donaldson, (Applicant) v. Local 75 HRCE AFL, CIO, CLC, (Respondent). (28 employees in unit). (*Withdrawn*).

2098-83-R: Judy Omer, (Applicant) v. United Rubber, Cork, Linoleum and Plastic Workers of America, AFL, CIO, CLC, (Respondent).

Unit: “all employees of Graphics Space Circuits Inc. (Space Circuits Ltd.) at the City of Waterloo, save and except foremen, persons above the rank of foreman, office, clerical, technical and sales staff and those persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (16 employees in unit). (*Granted*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

2170-83-U: Busch Painting Limited, (Applicant) v. International Brotherhood of Painters and Allied Trades, Local 201, Fred Farkas, Richard Legault et al, (Respondents). (*Withdrawn*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL LOCKOUT

1591-83-U: International Union of Operating Engineers, Local 793, (Complainant) v. Noranda Mines Limited and Noranda Exploration Company Limited, Canadian Mine Services Limited, Cameron Mcmynn Contracting Limited, Canadian Mine Enterprises Limited, (Respondents) v. Labourers International Union of North America Ontario Provincial District Council, Labourers International Union of North America, Local 607, United Brotherhood of Carpenters and Joiners of America, Local 1669,

United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 508, International Association of Bridge, Structural and Ornamental Ironworkers, Local 759 and United Steelworkers of America, (Interveners). (*Withdrawn*).

2207-83-U: United Food and Commercial Workers International Union AFL, CIO and its Local 287, (Applicant) v. Canadian Dressed Meats Limited, (Respondent). (*Withdrawn*).

COMPLAINTS OF UNFAIR LABOUR PRACTICE

0145-81-U: Clarence Kitchen, (Complainant) v. Retail, Wholesale, Bakery & Confectionary Workers Union, Local 461, (Respondent). (*Dismissed*).

0052-82-U: International Ladies Garment Workers' Union, (Complainant) v. Apple Bee Shirts Limited, (Respondent). (*Granted*).

1477-82-U: Kuljinder Singh Bhanga and Newman Nkrumah, (Complainants) v. United Food & Commercial Workers Local 287 and Charles Bonello, (Respondents) v. Caravelle Foods, (Intervener). (*Dismissed*).

2460-82-U: Ontario Public Service Employees Union, (Complainant) v. Danver Ambulance Service Inc., (Respondent). (*Withdrawn*).

2604-82-U: Labourers' International Union of North America, Local 607, (Complainant) v. Thunderhawk Developments (384368 Ontario Limited) and Roger Dolyny, (Respondents). (*Granted*).

0118-83-U: Anne Moore, (Complainant) v. Ontario Nurses Association (O.N.A.) and St. Thomas Elgin General Hospital, (Respondents). (*Withdrawn*).

0333-83-U: The Mount Nemo Truckers Association, Local 566, Affiliates of the United Cement, Lime & Workers International Union, AFL, CIO, CLC, (Complainant) v. Nelson Quarry Operations of Genstar Stone Products Inc., and Torres Transport Limited, (Respondent). (*Withdrawn*).

0337-83-U; 0338-83-U: The United Brotherhood of Carpenters and Joiners of America, Lumber and Sawmill Workers Union, Local 2754, (Complainant) v. Canada Veneers Limited, (Respondent). (*Withdrawn*).

0500-83-U: N. Ghermeck, M. Cochrane, et al, (Complainants) v. Teamsters Local 230 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Respondent) v. Dufferin Concrete Products – Toronto Division, (Intervener #1) v. Teamsters Union, Joint Council No. 52, (Intervener #2) v. Group of Teamsters Local Union 879 Employees, (Intervener #3). (*Dismissed*).

0667-83-U: Timothy W. Smith and William Morton, (Complainants) v. Toronto Joint Board Amalgamated Clothing & Textile Workers Union Local 1414J, (Respondent). (*Granted*).

1023-83-U: United Steelworkers of America, (Complainant) v. H. R. Radomski & Co. Ltd., (Respondent). (*Granted*).

1116-83-U: Canadian Union of Educational Workers, (Complainant) v. University of Toronto, (Respondent). (*Granted*).

1166-83-U: Hotels, Clubs, Restaurants, and Taverns Employees' Union, Local 261, Ottawa, (Complainant) v. The Mill Dining Lounge Limited, (Respondent). (*Withdrawn*).

1250-83-U: Harry N. Batasar, (Complainant) v. Canadian General-Tower Limited (Etobicoke Plant), and United Steel Workers of America, (Respondents). (*Dismissed*).

1259-83-U: Susan G. Bartlett, (Complainant) v. The Amalgamated Clothing and Textile Union, AFL, CIO, CLC, Shoe Division, Local 307, (Respondent) v. Savage Shoes Ltd., (Intervener). (*Granted*).

1315-83-U: Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Complainant) v. Maple Leaf Taxi Company Ltd., (Respondent). (*Granted*).

1341-83-U: Ross Frank Cioe, (Complainant) v. Port Bolster Drive-In Theatre Limited, (Respondent) v. Toronto Motion Picture Projectionists' Union, Local 173 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, (Intervener). (*Granted*).

1368-83-U: Canadian Union of Public Employees, (Complainant) v. Covenant House Under 21 Youth Foundation of Metropolitan Toronto, (Respondent). (*Dismissed*).

1483-83-U: United Steelworkers of America and David Shuart, (Complainants) v. Sanivan Ontario Inc., Sanivan Inc., and International Union of Operating Engineers, Local 793, (Respondents). (*Withdrawn*).

1522-83-U: United Brotherhood of Carpenters and Joiners of America, Union Local 2679, (Complainant) v. Pinehurst Woodworking Co. Ltd., (Respondent). (*Withdrawn*).

1540-83-U: Carlos Garcia, Louis Hackl, Jose Cuervo, Adrian Ghirardi and Jorge Menegotti, (Complainants) v. United Steelworkers of America, and Inglis Ltd., (Respondents). (*Dismissed*).

1593-83-U: United Brotherhood of Carpenters and Joiners of America, Local 1669, and International Association of Bridge, Structural and Ornamental Ironworkers, Local 759, (Complainants) v. Cameron McMynn Contracting Limited, Canadian Mine Enterprises Limited, Canadian Mine Services Limited and Noranda Mines Limited and Noranda Exploration Company Limited, (Respondents) v. Labourers International Union of North America Ontario Provincial District Council, Labourers International Union of North America, Local 607, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 508, and United Steelworkers of America, (Interveners). (*Withdrawn*).

1678-83-U: Leslie George Nagy, (Complainant) v. United Steel Workers of America, Local 1005, and Selco Inc., (Respondents). (*Dismissed*).

1693-83-U: Energy and Chemical Workers Union, CLC, (Complainant) v. United Cement, Lime, Gypsum and Allied Workers International Union, AFL, CIO, CLC, (Respondent). (*Dismissed*).

1696-83-U: Juliet Irmay, (Complainant) v. Laundry, Dry Cleaning & Dye House Workers' International Union, Local 351, (Respondent). (*Dismissed*).

1750-83-U: Surjit Singh Dhaliwal, (Complainant) v. The Upholsterers' International Union of North America, AFL, CIO and Bilt Rite Upholstering Company Limited, (Respondents). (*Withdrawn*).

1754-83-U: Hotels, Clubs, Restaurants & Tavern Employees' Union, Local 261, (Complainant) v. Allan A. Morrow, Vice President, Foodcorp Limited, (Respondent). (*Withdrawn*).

1777-83-U: Hotel Employees, Restaurant Employees Union, Local 75, (Complainant) v. 470469 Ontario Limited, (Respondent). (*Withdrawn*).

1786-83-U: Pat Watters, (Complainant) v. United Steelworkers of America, Local 8982, (Respondent). (*Withdrawn*).

1803-83-U: Health, Office & Professional Employees Division, Local 206 of the Retail, Commercial & Industrial Union, chartered by the United Food & Commercial Workers International Union, CLC, AFL, CIO, (Applicant) v. Vernon Nursing Home Services Limited, (Respondent). (*Withdrawn*).

1818-83-U: Edward Oliver Jones and Cesare Luciani, (Complainants) v. The United Food and Commercial Workers International Union, Local 206 of Retail Commercial & Industrial Union, (Respondent). (*Dismissed*).

1828-83-U: Lorraine Seguin, (Complainant) v. John Rennie Ltd., (Respondent). (*Withdrawn*).

1829-83-U: Lorraine Seguin, (Complainant) v. Joe Sutter, Union Representative, Amalgamated Clothing & Textile Union, (Respondent). (*Withdrawn*).

1833-83-U: Labourers' International Union of North America, Local 183, (Complainant) v. Honeywell Limited, (Respondent). (*Withdrawn*).

1835-83-U: The Windsor Newspaper Guild Local 139, The Newspaper Guild (CLC, AFL, CIO), (Complainant) v. The Windsor Star, (Respondent). (*Granted*).

1868-83-U: United Steelworkers of America, (Complainant) v. Schauenburg Industries Ltd., (Respondent). (*Withdrawn*).

1869-83-U: United Steelworkers of America, (Complainant) v. Bell & White Analytical Laboratories Ltd., (Respondent). (*Withdrawn*).

1876-83-U: Labourers' International Union of North America, Local 183, (Complainant) v. Viewmark Homes Ltd., (Respondent). (*Withdrawn*).

1878-83-U: Sheet Metal Workers International Association, Local 537, (Complainant) v. Steve's Sheet Metal Co., being a Division of S.N. Ventilation Heating Ltd., (Respondent). (*Withdrawn*).

1883-83-U: James E. Hutton, (Complainant) v. Union Carbide & Local 512, (Respondent). (*Withdrawn*).

1892-83-U: United Brotherhood of Carpenters and Joiners of America, Local 1316, (Complainant) v. Wm. J. Broome Ltd., Merit Drywall & Acoustics Ltd., Central Drywall & Acoustics Company, (Respondents). (*Granted*).

1900-83-U: United Brotherhood of Carpenters and Joiners of America, Lumber and Sawmill Workers' Union, Local 2754, (Complainant) v. Canada Veneers Limited, (Respondent). (*Withdrawn*).

1904-83-U: Justino Pereira, (Complainant) v. International Woodworkers of America, Local 2-94, (Respondent). (*Withdrawn*).

1921-83-U: United Steelworkers of America, (Complainant) v. MacKenzie Milne Industrial Hardware and Equipment, (Respondent). (*Withdrawn*).

1948-83-U: United Food and Commercial Workers International Union, (Complainant) v. Swiss Chalet, (Respondent) v. Canadian Union of Restaurant and Related Employees, (Intervener). (*Withdrawn*).

1957-83-U: Harry K. Beechie, (Complainant) v. Rockwell & Union Local 1941, U.A.W., (Respondent). (*Withdrawn*).

1977-83-U: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Complainant) v. Industrial Platers (Windsor) Limited Division of Unlimited Textures Company Limited, (Respondent). (*Withdrawn*).

1980-83-U: Farouk Bacchus, (Complainant) v. Teamsters Local 419, (Respondent). (*Withdrawn*).

1981-83-U: Lloyd Reid, (Complainant) v. Teamsters Local 419, (Respondent). (*Withdrawn*).

1983-83-U: International Ladies' Garment Workers' Union, (Complainant) v. Lindzon Limited, (Respondent). (*Withdrawn*).

1992-83-U: Canadian Union of Public Employees and its Local 210, (Complainant) v. The Corporation of the City of Timmins, (Respondent). (*Withdrawn*).

1996-83-U: The Electrical Power Systems Construction Association and Ontario Hydro, (Complainant) v. Ontario Allied Construction Trades Council, United Brotherhood of Carpenters and Joiners of America, Lake Ontario District Council, Quintin Begg and Tom Hill, (Respondents). (*Withdrawn*).

2012-83-U: Lucien Gerard Beyette, (Complainant) v. United Steelworkers of America, Local 8522, and Curtis Harris Industries (Curtis Campers), (Respondents). (*Withdrawn*).

2037-83-U: Laundry & Linen Drivers and Industrial Workers, Local 847, affiliated with the International Brotherhood of Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. The Pestco Company of Canada Ltd., (Respondent). (*Withdrawn*).

2047-83-U: Helen O'Donnell, (Complainant) v. Mark Ortlieb Service Employees Union, (Respondent). (*Withdrawn*).

2089-83-U: W. J. Craig Tattersall, (Complainant) v. Jim Conium, PPL UAW Chair Person, Fran Piercy, President Local 1620, Bert Rovers, International Rep. UAW, (Respondents). (*Withdrawn*).

2193-83-U: Ian Penney, (Complainant) v. Steve's Sheet Metal Company, (Respondent). (*Withdrawn*).

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

1513-82-M: International Brotherhood of Electrical Workers, Local Union 636, (Applicant) v. Wasaga Beach Hydro-Electric Commission, (Respondent). (*Withdrawn*).

0345-83-M: The Ontario English Catholic Teachers' Association, (Applicant) v. The Executive Director, Deputy Executive Director, Department Co-ordinators and Staff Assistants employed at the Association, (Respondents). (*Terminated*).

0474-83-M: U.A.W. Local 1980, (Applicant) v. Philco, (Respondent). (*Withdrawn*).

0715-83-M: United Electrical, Radio and Machine Workers of America (UE) and its Local 513, (Applicant) v. Simmons Limited (Toronto Division), (Respondent). (*Dismissed*).

1630-83-M: Ontario Public Service Employees Union, (Applicant) v. Ajax and Pickering General Hospital, (Respondent). (*Withdrawn*).

1863-83-M: Ontario Nurses' Association, (Applicant) v. John Noble Home, (Respondent). (*Withdrawn*).

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

1335-83-OH: Robert Gill & David Hussey, (Complainant) v. Black & McDonald Ltd., (Respondent). (*Granted*).

1502-83-OH: Labourers' International Union of North America, Local 1059 and E. Resendes, (Complaints) v. Sandercock Construction (1976) Limited and Ernie Hoey, (Respondents). (*Granted*).

1969-83-OH: Ronald Wright, (Complainant) v. Diamond Canapower Ltd., (Respondent). (*Withdrawn*).

2102-83-OH: W. J. McCorkell, (Complainant) v. Keith Longchamps, (Respondent). (*Withdrawn*).

CONSTRUCTION INDUSTRY GRIEVANCES

1556-79-M; 1397-81-M: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1304, 1963, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. West York Construction Ltd., (Respondent) v. Van Bots Construction, (Respondent) v. General Contractors Section of the Toronto Construction Association, (Intervener) v. Metropolitan Toronto Apartment Builders Association, (Intervener) v. Ontario Form Work Association, (Intervener) v. Labourers International Union of North America, Local 183, (Intervener). (*Dismissed*).

1861-82-M: Christian Labour Association of Canada, (Applicant) v. Carroll Electric (1982) Limited, (Respondent) v. Derek Murr, (Employee). (*Granted*).

0010-83-M: International Union of Operating Engineers, Local 793, (Applicant) v. Employer Bargaining Agency and its Affiliate Lanor Crane Rentals Inc., (Respondent). (*Withdrawn*).

0191-83-M: International Association of Bridge, Structural and Ornamental Iron Workers, Local 700, (Applicant) v. Tri-Con Mechanical (Sarnia) Limited, Tri-Con Mechanical Holdings Limited, (Respondents). (*Granted*).

0471-83-M: Labourers' International Union of North America, Local 506, (Applicant) v. Stephen Sura Inc. and Stephen Sura (Canada) Ltd., (Respondents). (*Withdrawn*).

0514-83-M: International Union of Operating Engineers, Local 793, (Applicant) v. Pentrex Leasing Ltd., (Respondent). (*Withdrawn*).

1302-83-M: United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. Canbar Products Limited, (Respondent). (*Withdrawn*).

1404-83-M: United Brotherhood of Carpenters and Joiners of America, Local 1946, (Applicant) v. Commercial Forming Limited, (Respondent). (*Granted*).

1450-83-M: Labourers International Union of North America, Local 527, (Applicant) v. Bellai Brothers Limited, (Respondent). (*Granted*).

1496-83-M: The Millwright District Council of Ontario on its own behalf and on behalf of Locals 1916 and 1007, (Applicant) v. General Riggers & Erectors of Canada Limited, (Respondent). (*Withdrawn*).

1513-83-M: Local Union 71, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, (Applicant) v. Alfred's Mechanical Pressure Welding Company Limited, (Respondent) v. Joe's Plumbing and Heating, (Interested Party). (*Granted*).

1519-83-M: The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 800, (Applicant) v. Morrison Plumbing & Heating (Sudbury) Limited, (Respondent). (*Withdrawn*).

1622-83-M: Resilient Floorworkers, Local Union 2965, (Applicant) v. Perfection Rug Co. Ltd., (Respondent). (*Withdrawn*).

1836-83-M: United Brotherhood of Carpenters and Joiners of America, Local 2486, (Applicant) v. Roman Plastering & Acoustical Co., (Respondent). (*Granted*).

1858-83-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Linrin Forming Limited, (Respondent). (*Withdrawn*).

1893-83-M: United Brotherhood of Carpenters and Joiners of America, Locals 1946 and 1316, (Applicant) v. Spring Store Fixtures Ltd., (Respondent). (*Granted*).

1902-83-M: International Brotherhood of Electrical Workers, Local 353, (Applicant) v. Vergamo Construction Limited carrying on business as Vergamo Electric Contractors, (Respondent). (*Granted*).

1917-83-M; 1918-83-M; 1919-83-M: United Brotherhood of Carpenters and Joiners of America, Local 1256, (Applicant) v. SNC/FW Ltd., (Respondent). (*Withdrawn*).

1928-83-M: L.I.U.N.A., Local 506, (Applicant) v. Bradsill Limited, (Respondent). (*Withdrawn*).

1947-83-M: Labourers' International Union of North America, Local 1089, (Applicant) v. JafSCO Construction Ltd. and 545439 Ontario Inc. c.o.b. under the firm name and style of St. Clair Construction, (Respondents). (*Granted*).

1953-83-M: Ontario Council of the International Brotherhood of Painters and Allied Trades and the International Brotherhood of Painters and Allied Trades, Local 1590, (Applicant) v. Wm. J. Broome Ltd. and Central Drywall & Acoustics Company, (Respondent). (*Granted*).

1954-83-M: Ontario Council of the International Brotherhood of Painters and Allied Trades and the International Brotherhood of Painters and Allied Trades, Local 1590, (Applicant) v. Wm. J. Broome Ltd., (Respondent). (*Granted*).

1955-83-M: The Toronto-Central Ontario Building and Construction Trades Council on behalf of its affiliates listed in Schedule "A", and the affiliates listed in Schedule "A" on their own behalf, (Applicant) v. Mastercraft Bridge and Engineering Construction (Ottawa) Limited, (Respondent). (*Withdrawn*).

1970-83-M: The United Brotherhood of Carpenters and Joiners of America, Local 18, (Applicant) v. H. G. Susgin Construction Ltd., (Respondent). (*Granted*).

1982-83-M: Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Eva Contractors Limited, (Respondent). (*Granted*).

2010-83-M: International Union of Operating Engineers, Local 793, (Applicant) v. Serit Construction Limited, (Respondent). (*Granted*).

2011-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Butera Construction Inc., (Respondent). (*Withdrawn*).

2020-83-M: Sheet Metal Workers' International Association, Local 504, (Applicant) v. Reddi Metals Limited, (Respondent). (*Granted*).

2021-83-M: Sheet Metal Workers' International Association, Local 504, (Applicant) v. S & E Mechanical, A Division of 471177 Ontario Limited, (Respondent). (*Granted*).

2025-83-M: The Bricklayers, Masons Independent Union of Canada Local 1, (Applicant) v. The Masonry Contractors Association of Toronto Inc., and Blossom Masonry Contractors Ltd., (Respondents). (*Granted*).

2030-83-M: Formwork Council of Ontario, (Applicant) v. Highrise Crane & Rental Limited, (Respondent). (*Withdrawn*).

2031-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Pit-On Construction Co. Ltd., (Respondent). (*Withdrawn*).

2032-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Roma Excavating & Grading, (Respondent). (*Withdrawn*).

2033-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Thornhill Excavating & Grading Ltd., (Respondent). (*Withdrawn*).

2034-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Toronto Underground Contracting Ltd., (Respondent). (*Withdrawn*).

2035-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. C.D.C. Contracting, a Division of Patron Contracting Limited, (Respondent). (*Granted*).

2036-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Gamen Paving Const. Ltd., (Respondent). (*Withdrawn*).

2040-83-M: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers Local Union 128, (Applicant) v. Mayweld Company Limited, (Respondent). (*Granted*).

2048-83-M: Labourers' International Union of North America, Local 527, (Applicant) v. Joe Arban Contractor Limited, (Respondent). (*Withdrawn*).

2049-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Midview Construction & Drain Ltd., (Respondent). (*Withdrawn*).

2050-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Molinari Carpentry Ltd., (Respondent). (*Granted*).

2065-83-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Rock Engineering Construction Ltd., (Respondent). (*Granted*).

2068-83-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Antinori Building Cont. Inc., (Respondent). (*Withdrawn*).

2070-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Inverleigh Construction Ltd., (Respondent). (*Withdrawn*).

2094-83-M: United Brotherhood of Carpenters and Joiners of America, Local 2486, (Applicant) v. O.P.E.C. Acoustics and Drywall Ltd., (Respondent). (*Granted*).

2101-83-M: The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industries of the United States and Canada, Local Union 853, (Applicant) v. Wormald Fire Systems Inc., (Respondent). (*Withdrawn*).

2112-83-M: Labourers' International Union of North America, Local 1089, (Applicant) v. Sheaffer-Townsend Construction Ltd., (Respondent). (*Withdrawn*).

2118-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Miwel Construction Ltd., (Respondent). (*Withdrawn*).

2119-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Kipling Paving Co. Ltd., (Respondent). (*Withdrawn*).

2120-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Burlington Fence Ltd., (Division of Peel Fence Systems Inc.), (Respondent). (*Withdrawn*).

2132-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Ontario Paving Company, (Respondent). (*Withdrawn*).

2133-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. V.B.N. Construction Ltd., (Respondent). (*Withdrawn*).

2134-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Comus Construction Limited, (Respondent). (*Withdrawn*).

2136-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. F. R. Paving Co. Ltd., (Respondent). (*Withdrawn*).

2143-83-M: Labourers' International Union of North America, Ontario Provincial District Council and Local 1081, (Applicant) v. Acme Building and Construction Ltd, (Respondent). (*Withdrawn*).

2164-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Tamar Construction Ltd., (Respondent). (*Withdrawn*).

2165-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Lakeview Estate, (Respondent). (*Withdrawn*).

2178-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Sivi Construction, (Respondent). (*Withdrawn*).

APPLICATIONS FOR RECONSIDERATION OF THE BOARD'S DECISION

1437-80-M: Carpenters' District Council of Toronto and Vicinity, on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 1304, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Inducon Construction (Northern) Inc., Inducon Development Corporation, Inducon Construction Canada Limited, Desbil Management Inc. and Inducon Design/Build Associates, (Respondents). (*Withdrawn*).

0711-81-R: United Brotherhood of Carpenters and Joiners of America, Local 1190, (Applicant) v. Two Star Construction Ltd., (Respondent) v. Labourers' International Union of North America, Local 183, (Intervener). (*Denied*).

0759-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Two Star Construction Ltd., (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local 1190, (Intervener). (*Denied*).

2010-81-R: United Steelworkers of America, (Applicant) v. Securicor Investigation and Security Ltd., (Respondent). (*Denied*).

2011-81-M: United Steelworkers of America and the United Steelworkers of America, Local 7105, (Complainants) v. Securicor Investigation and Security Ltd., (Respondent). (*Denied*).

1803-82-R: Ontario Public Service Employees Union, (Applicant) v. The Board of Education for the City of Toronto, (Respondent) v. The Federation of Women Teachers Associations of Ontario, (Intervener #1) v. Ontario Secondary School Teachers' Federation District 15, (Intervener #2) v. Canadian Union of Public Employees, (Intervener #3) v. Ontario Public School Teachers' Federation, (Intervener #4) v. Group of Employees, (Objectors). (*Denied*).

2605-82-R: Labourers' International Union of North America, Local 607, (Applicant) v. Thunderhawk Developments, (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local 1669, (Intervener). (*Denied*).

2697-82-M: United Brotherhood of Carpenters and Joiners of America, Local 785, (Applicant) v. Grand Valley Construction Association and Carpenters Employer Bargaining Agency, (Respondents). (*Denied*).

0290-83-U: International Woodworkers of America, Local 2-69, (Complainant) v. Consolidated Bathurst Packaging Ltd., (Respondent). (*Denied*).

0593-83-U: Michael Bruen, (Complainant) v. International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), (Respondent). (*Dismissed*).

*Ontario Labour Relations Board,
400 University Avenue,
Toronto, Ontario*

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Decisions

February 84



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Selected decisions of particular reference value are
also reported in *Canadian Labour Relations Boards
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2380-83-R Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, Applicant, v. **Alpha Taxi Ltd.**, Respondent, v. Canadian Union of Operating Engineers and General Workers Local 222, Intervener #1, v. The Ottawa Taxi Owners and Brokers Association, Intervener #2

Certification – Constitutional Law – Practice and Procedure – Union filing applications simultaneously before Ontario and Canada Labour Boards – Parties unaware of new test to determine constitutional jurisdiction set out by Court of Appeal – Proceeding adjourned to permit parties to determine status of Canada Board hearing and consider impact of Court of Appeal decision – Union and employer association not representing employees or employers affected denied intervener status

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members B. L. Armstrong and W. H. Wightman.

APPEARANCES: *Frank Reilly and Hugh Buchanan for the applicant; Eugene Gitzi, Alberto Copelli and Julius Gitzi for the respondent; Pat Newell, Don Villeneuve and John Villeneuve for intervener #1; E. Rovet for intervener #2.*

DECISION OF THE BOARD; February 16, 1984

1. This is an application for certification. For ease of reference the respondent employer will be referred to as “Alpha”, and the interveners will be referred to as the “CUOE” and the “Taxi Association”.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

3. When this matter came on for hearing before the Board on February 3, 1984 there were two issues raised: the status of the interveners to take part in these proceedings; and the constitutional jurisdiction of this Board to entertain the case. It will be convenient to refer briefly to each of these matters, beginning first with the constitutional question.

I

4. Alpha, as its name suggests, is a Taxi business in the City of Ottawa. It operates pursuant to a municipal licence. A small percentage of its business involves trips to Hull in the Province of Quebec. In a similar case involving *Windsor Airline Limousine Services Ltd.*, the Board was persuaded that the company’s business was within provincial jurisdiction, and on judicial review, the Divisional Court agreed with the Board’s conclusion (see *Re Windsor Airline Limousine Services Ltd. and Ontario Taxi Association*, 1688 (1980) 30 O.R. (2d) 732. However, the Ontario Court of Appeal has recently concluded that the wrong test was applied in *Windsor Airline Limousine Services Ltd.* The Court held that a percentage of business test should not govern the constitutional determination (see *Ottawa-Carleton Regional Transit Commission and Amalgamated Transit Union Local 279 et al.*, decision released December 20, 1983,) [now reported at 84 CLLC ¶14,006]. It commented:

Rather, the determination of the essential issue as to whether the undertaking connects provinces should be based upon the continuity and regularity of the connecting operation or extra provincial business.

5. To determine this Board's jurisdiction, it will be necessary to:
 - a) hear detailed evidence concerning the nature and extent of Alpha's business, and
 - b) apply the law as developed in *Ottawa-Carleton Regional Transit Commission* and the cases cited therein.

As of the date of the hearing, none of the parties had seen the recent Court of Appeal decision or had had an opportunity to consider its applications for this case. The parties were not in a position to put before the Board the detailed evidence necessary to resolve the constitutional question nor were they prepared to argue the law. They thought the constitutional question had been settled by the Divisional Court, but, obviously it has not. On this basis alone, it would be necessary to adjourn the proceeding to a later date.

6. But there is an additional reason for an adjournment. It appears that all of the parties in this case are potentially affected by a parallel certification application filed by the CUOE with the Canada Labour Relations Board. That Board too will have to make a constitutional determination, and it is obviously in no one's interest to have two cases involving the same parties proceeding in tandem in different forums. On the other hand, the applicant is anxious to have an expeditious resolution of this application, and it is by no means clear that this can be accomplished by awaiting the decision of the Canada Labour Relations Board. Accordingly, the parties indicated that they would make enquiries of the Canada Labour Relations Board and subsequently advise this Board of the status of the other proceeding. We will then be in a better position to determine whether this case should be continued or be adjourned pending a federal decision.

II

7. The other matter raised at the hearing involves the right of the interveners to participate.

8. There is a collective agreement between the CUOE and the Taxi Association affecting a number of employers in Ottawa. The Association argues that this collective agreement does *not* cover the drivers who are the subject of this application (i.e., the drivers are not in the bargaining unit described in the collective agreement), however, the Association argues that it is interested in this case because of its potential effect on the Taxi industry in Ottawa. The Association submits that it has a practical or pragmatic interest in the outcome because, for some years, it has been attempting to achieve a common broad-based bargaining relationship which will minimize industrial conflict. To introduce a new union on the scene would only complicate its operations, as would a constitutional determination which fragments the established bargaining structure or divides regulatory authority between the two levels of government. The Association is a party in the federal proceeding. It seeks *amicus curiae* status here.

9. No doubt the Association has a commercial interest in this case, but we are not prepared, on that basis alone, to grant it status as an intervener. The Association is not an employer of any of the employees affected by the application, nor does it represent any such employer. Alpha may well be a member of the Association, but, the fact is, Alpha chose to appear on its own. It could have designated the Association to represent it – just as a trade union may represent certain employees – but it did not. Nor is it significant in our view that the Association may have status in the federal proceeding where the circumstances are quite different. We do not think the Association has a sufficient interest in this matter to be granted status as an intervener.

III

10. The CUOE is also seeking status as an intervener, claiming to be the incumbent union representing the employees whom the applicant now seeks to represent. The CUOE asserts that those employees are already bound by its existing collective agreement which operates as a bar to the present application.

11. The CUOE did not file *any* documentary evidence indicating that *any* of the individuals potentially affected by this application are members of the CUOE. All that was filed is the collective agreement with the Association – the very collective agreement which, as we have noted, the Association asserts does *not* cover the employees in this case – and, on its face, that agreement does not cover these drivers. Moreover, that collective agreement was based upon an earlier voluntary recognition agreement (also filed with the Board). It does not clearly relate to the drivers either. On the contrary, it appears to *exclude* them, and certain of its provisions contemplate the organization of drivers *by another union* – the very thing which has happened here. And of course, there is nothing before the Board to indicate that at the time this voluntary recognition arrangement was entered into, the CUOE represented *anyone* – let alone the drivers which the applicant seeks to represent.

12. It may be that the CUOE has tried to assist drivers from time to time, and it may be that the drivers, pursuant to the agreement, are required to contribute sums to the union to support some of its activities. The agreement mentions the negotiation of “cab rents” which are obviously of interest to the drivers, however, it is conceded that such negotiations are *not* with *employers* but with the municipal licencing body. In other words, such activity as CUOE might undertake on behalf of the drivers is not collective bargaining activity in the sense contemplated by a labour relations statute. (We need not consider the legality of the CUOE using a collective agreement to extract money from employees it does not represent in collective bargaining.) Finally, although not binding upon us, we take note of a recent arbitration award between the CUOE and the Association involving this very issue and this very collective agreement. In a decision dated July 28, 1983, the arbitrator concluded (as we find, and the Association asserts) that drivers whom the applicant union seeks to represent, are not covered by the collective agreement.

13. For the foregoing reasons, the Board is satisfied that the CUOE does not have status as an intervener, nor is it an incumbent trade union with the status to participate on that basis. Whether it could intervene as the representative of one or more employees in the bargaining unit, we need not now determine. In order to do so it would have to file documentary evidence of membership on behalf of such individual(s) and no such evidence has been filed.

14. This matter is hereby adjourned *sine die* while the parties are considering their positions and making enquiries of the Federal Board. The Board notes the respondent company's willingness to meet with the applicant union with a view to concluding an agreed statement of facts. If the applicant and respondent can reach agreement on the general nature of the company's business, it may well shorten any subsequent hearing which may be held, or eliminate the need for a hearing altogether.

2507-83-R D. & T. Association of Employees, Applicant, v. Bartlett Transport Ltd., Respondent

Trade Union Status – All membership cards predating adoption of constitution – No reaffirmation of membership after adoption – Certification application filed prior to adoption of constitution – No status as of application date – Request to amend application date denied since no evidence of reaffirmation

BEFORE: Kevin M. Burkett. Alternate Chairman, and Board Members J. A. Ronson and S. Cooke.

APPEARANCES: *William K. Ebert, Q.C. for the applicant; Kris Phillips for the respondent.*

DECISION OF THE BOARD; February 29, 1984

1. The name of the respondent is amended to read Bartlett Transport Ltd.
2. This is an application for certification.
3. The Registrar, in a letter dated February 3, 1984, advised the applicant that it must be prepared at the hearing scheduled in this matter to satisfy the Board in accordance with the Board's usual practice that its organization is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
4. Mr. Real Poulin, a professional driver with the respondent company and one of the persons instrumental in bringing the applicant organization into being, was called to give evidence in support of its status as a trade union within the meaning of the Act. His evidence establishes that a constitution was adopted at a meeting on February 12, 1984 by those who had signed membership cards in the applicant organization. The constitution contains proper collective bargaining objectives and provides for the election of officers whose duties are set out and the payment of fees, dues and assessments. The membership evidence filed in support of the application was signed in November, 1983. The application was filed on February 1, 1984, some twelve days before the constitution was adopted. There is no evidence that those who had signed membership cards reaffirmed their membership following the adoption of the constitution.
5. Important rights and obligations flow from a granting of trade union status and,

therefore, the Board is circumspect in making status determinations. In this case, the constitution was not adopted until after the application was filed so that the applicant was clearly not a trade union as of the date of filing. Furthermore, all of the membership evidence pre-dates by at least two months the adoption of the constitution and there is no evidence that those who signed membership documents reaffirmed their membership in the applicant after the adoption of the constitution. Having regard to the foregoing, we are not satisfied as of the date of application that the applicant is a trade union within the meaning of the Act. Furthermore, in the circumstances of this case where there is no evidence that there has been any reaffirmation of membership, we are not prepared to allow the applicant to amend the filing date of the application.

6. This application is hereby dismissed.

2026-81-M International Union of Elevator Constructors, Local #50, Applicant, v. Beckett Elevator Company Limited, Respondent, v. National Elevator and Escalator Association, Intervener

Construction Industry Grievance – Practice and Procedure – Reconsideration – Remedies – Board clarifying its compensation award – Double payment inevitable where employees hired contrary to collective agreement – Board not obliged to provide employer with copies of unreported decisions cited in Board decision – Documentary evidence and testimony of union officials credible to support findings – Employer’s interest liability changed from compound to simple interest – Reconsideration not opportunity re-argue case

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members J. Kennedy and F. W. Murray.

DECISION OF THE BOARD; February 6, 1984

I

1. This is a request for reconsideration of a decision of the Board dated September 23, 1983 (now reported at [1983] OLRB Rep. Sept. 1391). That request from the respondent Beckett reads as follows:

We are the solicitors for Beckett Elevator Company Limited, the Respondent in the above matter. Pursuant to Section 106 of the Labour Relations Act, on behalf of the Respondent, we request reconsideration of the Board’s decision dated September 23, 1983 on the following grounds.

(1) During argument, the Board’s attention was drawn to the case of *Girvin v. Consumers Gas* (1973) 1 O.R. (2d) 421. The Board’s attention was drawn to the fact that none of the grievors appeared at the hearing to testify and no official from any company or employer

testified before the Board. The only evidence before the Board were statements by the union witnesses of what they had been told or believed they had been told and transferred to their record cards concerning the dates of employment of the grievors, their rates and classifications. The Board's attention was drawn to the fact that there was thus no direct evidence but only hearsay evidence on the essential matters that it must determine i.e. who the grievors were if the grievors were at work or laid off and when, whether the grievors were available for work, and the grievors' classifications and rates of pay.

In such circumstances, it was submitted that given the Divisional Court's Decision in the *Girvin* case, there was not "credible" evidence on the essential points the Board must determine and that the case before the Board therefore ought to be dismissed for lack of evidence. The Board's decision makes no reference to the argument of the parties in relation to the *Girvin* case and we would request that the Board consider the effect of the case on its decision.

(2) At the time of the hearing, the parties made only a cursory reference to the question of the payment of interest. The Applicant requested interest and I believe made reference to the Board's practice note and the cases referred to therein. Counsel for the Respondent argued more or less in the terms outlined by the Board. The Board has provided 19 pages of discussion concerning whether or not interest ought to be paid on amounts found due. The Board has made repeated references to a large number of cases, none of which apparently were referred to by the parties and many of which are listed as unreported. In order that we might properly consider the basis for the Board's decision regarding interest, would you kindly provide the parties with, as a minimum, copies of all the cases listed as unreported so that they might be reviewed by counsel for the parties and if deemed advisable, submissions made thereon.

(3) The Board has awarded damages *to the Union* and interest on the total sum *to the Union* for distribution to the grievors. The employer, however, it is submitted has a liability under the Income Tax Act where monies are paid to the benefit of employees to withhold tax and has a specific liability under the Unemployment Insurance Act where monies are paid to the benefit of employees pursuant to an arbitration award to withhold the equivalent UIC payments and remit the same, if any, to the Unemployment Insurance Commission. The Board's order in its present form appears to place the employer in a position where it is ordered to pay monies in circumstances in which it is unable to comply with the relevant federal statutes. The Respondent therefore requests that the Board reconsider its decision and award specific amounts to specific grievors so that the Company might meet its legal obligations.

(4) The Board in paragraph 8 of its decision indicates the gross number of dollars to be paid for wages and benefits without any breakdown of how the specific amounts are calculated. Based on a review of the notes and exhibits filed at the hearing, it appears the Board has included in the total, amounts for benefits which are paid directly to the union and not to the employees. On the facts of the Board's award, in a situation where compensation is being paid to employees who are denied the opportunity to bump employees who are then working and for whom benefits were, by definition, being paid to the Union, the effect of the Board's order is to make the employer pay union benefits twice for the same hours of work. It is submitted that the Union is only entitled to one set of benefit payments for each hour "worked" and the Board's order constitutes a penalty against the employer and an unjust enrichment of the union in the sense that it is being paid twice for the same hours of work. The Respondent therefore requests the Board reconsider its decision and delete the "benefits" portion of its award.

(5) Similarly, there is no claim by the union before the Board that it did not receive any benefit payments and thus, to award that benefits be paid a second time, is to make a decision on a matter not before the Board and upon which it had no evidence or argument. The Respondent therefore requests that the Board reconsider its decision and delete the benefit portion from its award.

(6) To the extent the interest is awarded on the double payment of benefits to the Union, it is submitted that portion of the interest award is in itself an additional penalty being imposed upon the employer and not compensatory as the Union has suffered no loss by reason of the employer's actions having been paid the benefit portion at the time the original "bumped" employees worked. The Respondent therefore requests the Board reconsider its decision and delete the portion of the interest award applicable to the benefits the Company has already paid.

To this the applicant trade union responds:

This will acknowledge receipt of your letter of October 14th, 1983 in which you enclosed a copy of a letter from the solicitors for Beckett seeking reconsideration of the Board's decision, dated September 23rd, 1983. The following constitutes my response to the submissions of company counsel contained in Mr. McNaughton's letter of October 11th, 1983.

1. The proposition contained in paragraph 1 of Mr. McNaughton's letter was put to the Board during argument. My response was made at that time. The circumstances set out in the first paragraph of the request for reconsideration do not contain anything that is new or which

would fall within the Board's well established criteria for reconsideration.

2. With respect to the representations in the second paragraph of Mr. McNaughton's letter, both parties had an opportunity to make representations to the Board with respect to interest and did so at the hearing. The Board's decision to review the basis for allowing interest is not a matter which would justify reconsideration, given that both parties not only had a full opportunity but chose to make their submissions with respect to interest at the hearing. Needless to say, I have no objection to the Board forwarding copies of decisions as a courtesy to Mr. McNaughton.
3. With respect to paragraph 3, the Board's damage award is in a form frequently used by arbitrators. I am not aware of employers other than the respondent to this proceeding which have had difficulty complying with terms similar to those in the original Board's decision. In any event, it is my submission that the matters set out in paragraph 3 would not warrant reconsideration of the Board's decision.
4. It is submitted that the points raised in the fourth, fifth and sixth numbered paragraphs in Mr. McNaughton's letter are patently absurd. The union makes no claim for payment of benefits already paid for its members who worked. On the other hand, the benefits are payable under the collective agreement. The Board has concluded that the grievors should have been working and would have earned the amounts set out in paragraph 8 of the award had the employer not been in violation of the collective agreement. The respondent chose not to lead evidence. In any event, the reference to benefits shows a misconception of the claim and of the Board's award. Those employees who worked and received benefits are not in issue. The award of the Board is to compensate the grievors for lost wages and benefits they would have earned had they been properly assigned to work. There was no evidence that those employees who worked and were paid would have been laid off if the grievors had been properly assigned to work. In any event, the benefit portion of the Board's award is not to require the employer to pay benefits twice for hours worked but to pay compensation, including benefits for hours that ought to have been worked but were not worked.
5. In addition, in the last paragraph, the respondent's counsel argues interest is a penalty to the respondent. Interest was not claimed as a penalty nor awarded as such in my reading of the Board's decision.

For the reasons set out above, it is my submission that the Board ought to reject the respondent's request for reconsideration.

It will be convenient to deal briefly with each of the submissions made; however, we might note at the outset that much of what Beckett now submits either was raised or could have

been raised at the hearing in this matter. It would appear that, having been unsuccessful, Beckett now seeks to shore up its case or limit its liability. That is not the purpose for the broad power of reconsideration set out in section 106 of the Act.

2. The evidence tendered on behalf of the applicant union is summarized in the Board's decision. The details need not be repeated here. That evidence included work records for the aggrieved employees maintained by the union and used in the administration of its hiring hall. Although not business records in the usual sense, they are records kept in the ordinary course of the union's "business" in running the hiring hall established under the terms of the agreement. Those records indicate when and where the union's members are employed, as well as by whom. The union officials who administer the hiring hall both gave *viva voce* evidence in respect of these records and their effort to place their unemployed members in the employ of the respondent company. That evidence included telephone conversations in which Mr. A. Hopkirk, an official of Beckett, flatly refused to accept these out-of-work members into employment (as the collective agreement requires) then relented some days later. That refusal formed the basis for the alleged violation of the collective agreement. The duration of that refusal delimits the level of compensation.

3. The oral and documentary evidence are consistent and mutually supporting. There is no reason to doubt the accuracy of the union's records or the veracity of the union's witnesses. The respondent had the opportunity to cross-examine the union officials and/or call its own evidence to contradict their version of events. Mr. Hopkirk, whose refusal to hire the aggrieved employees triggered this grievance, was present in the hearing room, but was not called to dispute the union's account of the facts. Beckett called no evidence at all. We drew an adverse inference. In the circumstances, the Board was and remains satisfied that there was sufficient basis for its finding. The circumstances of this case and the nature of the evidence before the Board are both different from that in *Girvin*, and we do not think that decision is of any assistance to the respondent.

4. Both parties had a full opportunity to address the question of interest at the hearing, and each of them did so. The respondent's arguments are summarized in the Board's decision at paragraph 9. Counsel for the respondent may now be disposed to characterize those submissions as "cursory"; but surely it is a novel proposition for a party to suggest that because it only gave cursory treatment to a legal issue (which incidentally was characterized as "jurisdictional") the Board should do the same. The Board took the parties' arguments seriously, and sought to determine which was more consistent with the established judicial and arbitral jurisprudence. The fact that a party does not canvass readily available legal materials which may bear upon its argument, does not preclude the Board from doing so, nor can such party demand that the proceeding be reopened so that it can make further submissions on matters which could have been dealt with in the first place.

5. There being no basis for the Board to receive further submissions in the circumstances, it is unnecessary as a matter of courtesy or otherwise to provide Beckett with copies of the unreported decisions which the Board found when conducting its own research in respect of the submissions made to it. The unreported decisions merely supplemented and confirmed the arbitral trend evident in the reported decisions published in the standard reporting services. In any event, this unreported material is as available to the respondent as it was to the Board and from the same sources – the Public Service Grievance Settlement Board, and the Ontario Office of Arbitration, and can be photocopied at modest cost.

6. The compensation award was based upon the evidence before the Board as to what the aggrieved employees would have earned had they been employed by Beckett as required by the agreement. It represents their lost earnings from the refusal to employ them until Beckett relented or, in one case, the aggrieved individual found alternative work. That evidence was not contradicted or challenged at the time, and we do not think that it is open for the respondent to do so now. As we have already noted, that is not the purpose of section 106. Few decisions would ever be "final and binding" as the section contemplates if a party could relitigate evidentiary questions which were not squarely put in issue at the time.

II - The Interest Calculation

7. The interest calculation was based upon the formula set out in the decision itself. It involved the rate of 17.25 per cent for a period from October 18, 1981 to September 23, 1983, the date of the Board's final decision. This period, it will be observed, is just three weeks short of two full years. That was the time that the aggrieved employees were "out-of-pocket" and, conversely, the respondent was enriched to the extent that it retained and had the use of monies which should have been paid much earlier. Interest was compounded on an annual basis.

8. For six of the aggrieved employees - Messrs. Smith, Carlisle, Burton, Litterick, Naughton, and Stark - the loss of earnings (including employer contributions to employee benefit funds) totalled \$121.68 per day for the seven days until Beckett relented and hired them. For each of these employees the total direct cost, therefore, amounts to \$851.76. For the grievor Murphy, the loss is \$108.24 per day, for three days until he found alternative employment. His loss for these three days amounts, therefore, to \$324.72. When these sums are added together, it will be seen that the total direct losses to the grievors, as a group, amounts to \$5,435.28 - as the Board decision indicates. It is that amount upon which interest is payable.

9. If these sums had been outstanding for a full two years, the calculation would have been much simpler and compounded annually would have resulted in a total amount owing of \$7,472.19. As it is, however, the sum attributable to interest must be reduced by a small amount to reflect the fact that the monies owing were unpaid for three weeks less than two years. That explains why the total sum owing on this method of calculation is only \$7,408.76, as the Board decision indicates. We might also note that "rounding" to simplify calculations may result in an inaccuracy to the extent of a few cents one way or the other. Finally, it would seem that the total interest amount in paragraph 33 of the Board's decision, when calculated on an aggregate basis should read \$1,973.48 rather than \$1,972.98 - a difference of fifty cents. This typographical error may be the basis for the respondent's query about the calculation, and it was useful to have it drawn to our attention even though the actual sum involved was minimal.

10. For the grievors Smith, Carlisle, Burton, Litterick, Naughton, and Stark, the Board applied the interest formula set out above based upon the original \$851.76 debt over the almost two-year period up to September 23, 1983. The result was an amount of \$1,161.02, owing to each of these grievors which reflects the original \$851.76 and an additional \$309.26 in respect of interest. For Mr. Murphy, on the same basis, the sums were: \$442.62, comprising the original \$324.72 and an additional \$117.90 in interest. The total amount owing, then, was \$7,408.74 - a difference of two cents from that stated in the Board's award of September 23, 1983 and attributable to "rounding".

11. As indicated, the Board's calculations followed the interest rate formula suggested in the *Judicature Act, Hallowell House Limited*, [1980] OLRB Rep. Jan. 35, and Practice Note No. 13 (i.e., choosing the prime rate in the month in which the proceeding was initiated which was then compounded on an annual basis). It appeared to the Board that this was the most realistic measure of the employees' loss, and, of course, charging compound interest is a common commercial practice. Had the grievors had the money in hand and invested it, they would probably have *earned* compound interest, and had they borrowed funds to the extent of the employer's non-payment until payment was forthcoming they would undoubtedly have *paid* compound interest. On the other hand, compound interest on sums unpaid for a long period necessarily involves the possibility of interest upon a sum attributable to interest; and it would seem that the courts prefer to levy only "simple interest" in order to avoid this payment of "interest on interest". Upon reflection, having embraced the court approach to the calculation of interest and in the absence of any submissions or arbitral guidance on the desirability of compounding, we have determined to reconsider and revise this aspect of our decision so that the employer's interest liability will be based upon the payment of simple interest from the time the debt arose. However, we do this not because simple interest is intrinsically more appropriate than the method we have used; but rather because the choice of this calculation formula (resulting in a more generous but more realistic interest payment to an aggrieved party) should probably be left to a case where the choices are more carefully drawn and argued. For now, it is sufficient to amend our decision to provide for the payment of simple interest and leave it for another case to determine whether the Board could or should go beyond that.

12. Simple interest on the amount of \$851.76 at 17.25 per cent for the above-noted period of just less than two years amounts to \$285.38. In grievor Murphy's case, on the same basis, the original unpaid wage debt of \$324.72 attracts an additional increment of simple interest of \$108.80. It will be seen that this reduced the respondent's liability to Murphy by \$9.10 and to the other grievors by \$23.88 each.

13. Having regard to the foregoing, the Board finds that Beckett is liable for and directs that it must pay the sum of \$1,137.14 to Messrs. Smith, Carlisle, Burton, Litterick, Naughton, and Stark, and the sum of \$433.52 to grievor Murphy. To the extent that these amounts may vary from those set out in paragraph 33 of the Board's original decision, that paragraph is hereby varied. These amounts shall be payable forthwith. Whether from these amounts there must be some deduction in respect of income tax or, alternatively, whether upon receipt of such monies there arises some personal liability as between the tax payers and the Crown, we need not speculate. At the hearing the respondent did not raise this issue, nor does it now provide any information by which this Board could accommodate such concern in its calculations – particularly since the wage income and interest income may be treated on a somewhat different basis for tax purposes. In our view, it is sufficient to quantify the losses of the aggrieved employees and direct payment. Whether certain deductions should be made in respect of taxes (or unemployment insurance benefits for that matter) is a matter arising from the application of legislation which is not before the Board, or with which the Board need be concerned. However, we do not think that there is any reason to modify the form of our order, because under the *Labour Relations Act* it is the trade union which is the party to the collective agreement and the applicant union herein brought this grievance on behalf of its aggrieved members. We see no reason why we should not direct payment to the union on behalf of these aggrieved employees. Accordingly, the Board directs that the sum of \$7,256.36 be paid forthwith to the applicant union in trust for its aggrieved members, to be distributed upon the basis set above.

III

14. It is said by the respondent Beckett that the Board's compensation award amounts, to some degree, to a kind of "double payment" in respect of persons who were working as well as those who should have been hired if the terms of the collective agreement had been complied with. That may be so to some minimal degree, but, even if it is, we do not think that there is any justification, at this stage, for varying the method of calculation of the compensation owing. In the first place, as before, no such submission was made at the hearing in this matter, although counsel for the union carefully outlined the basis and details of the compensation claim. No objection to "double payment" was made at the time and there was no direct evidence as to the union's bookkeeping practices and whether some or all of these benefits were credited to the employees individually. The union officials could have been asked about this but were not. Perhaps they should have been, but as we have already indicated, section 106 is not intended to provide a losing party the opportunity to reframe, refine, or amplify its argument with the benefit of hindsight and an existing Board decision. Moreover, some double payment is inevitable when an employer fails to comply with hiring requirements in a collective agreement. He will be paying wages to those who worked as well as compensation for those who should have worked. "Double payment" of wages is inherent in the nature of the breach of the collective agreement, and there is no reason why, for example, the grievors should be deprived of contributions to benefit funds because such payments were made in respect of the employees who actually did the work which the grievors should have been hired to do. We also note that some of the apprentices initially displaced when Beckett decided to comply with its collective agreement obligations were almost immediately rehired.

15. For these reasons, we have acceded to Beckett's request for further clarification of the Board's compensation award, as well as some modification of that award. However, we do not wish to leave this matter without observing that, if the amounts owing in respect of interest appear to be a little high, it is only because Beckett initially chose to disregard its collective agreement obligations and engage in a protracted and time-consuming proceeding before this Board. As the earlier Board decisions in this matter amply indicate, once the union's complaint was crystallized, its grievance was submitted in accordance with the terms of the collective agreement to a joint union-management tribunal which determined that Beckett had, indeed, failed to live up to the terms of the agreement. That decision is one which Beckett later characterized before this Board as a "final and binding" but not "enforceable" determination as to its rights. Had Beckett chosen to abide by the decision of the Joint Industry Committee, there would have been no necessity to resort to this Board and there would have been no interest accruing during this litigation process. We make this observation not to deprecate Beckett's undoubted right to assert its legal position and require a determination before this Board, but only to underline why interest is an important component of compensation. An aggrieved party cannot recover its "costs" of a proceeding before the Board, but it should be able to recover a full measure of compensation, and should not be prejudiced by a delay in payment whether occasioned by the litigation process or otherwise.

1713-82-U Stanley Gray, Complainant, v. L. J. Bergie, Respondent

Health and Safety – Unfair Labour Practice – Employee member of statutory safety committee – Raising various health and safety concerns and accusing company and Ministry officials – Ministry official threatening to have committee disbanded and incumbents removed – No intention to intimidate complainant and prevent exercise of statutory rights – Motivated by desire to further policy of safety legislation – Whether Board having jurisdiction to hear complaint in unfair labour practice proceedings – Board finding it unnecessary to rule on defence of crown official's immunity from suit

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members I. M. Stamp and S. Cooke.

APPEARANCES: *J. K. A. Hayes, D. Bloom and S. Gray for the complainant; H. P. Rolph and L. J. Bergie for the respondent.*

DECISION OF THE BOARD; February 2, 1984

1. This is a complaint filed under section 89 of the *Labour Relations Act*, alleging that the respondent has dealt with the complainant in a manner which violates sections 70 and 3 of the Act. The latter two sections provide:

70. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

3. Every person is free to join a trade union of his own choice and to participate in its lawful activities.

The complaint alleges that the respondent sought to unlawfully restrain or discourage the complainant in the carrying out of the complainant's lawful trade union activities under the *Labour Relations Act*, and more specifically under the provisions of the province's *Occupational Health and Safety Act*. The complaint seeks relief in the form of a declaration that the Act has been violated, and, secondary to that, a posting by Mr. Bergie, presumably at the work place of the complainant's employer, Westinghouse. It should be noted that the complainant sought to have this complaint heard together with a complaint of unlawful discipline against his employer, Westinghouse Canada Inc., under section 24 of the *Occupational Health and Safety Act*, but the employer successfully persuaded the Board that that was inappropriate (see Board File No. 1714-82-OH, interim decision, reported [1983] OLRB Rep. Feb. 295). All findings of fact which involve Westinghouse in these proceedings, therefore, were made without the participation of Westinghouse itself.

2. The respondent, Lawrence Bergie, was at all material times acting in the capacity of Manager for the Hamilton region of the Industrial Health and Safety Branch, itself being one arm of the Occupational Health and Safety Division of the provincial government's Ministry of Labour. This immediately raises a number of questions concerning immunity and the

jurisdiction of this Board, all of which were put forward by the respondent in its initial pleadings. Because the application of these various “defences” turned in large measure on the Board’s ultimate findings of fact, however, the respondent’s counsel indicated at the outset that he was content to leave these matters for argument at the end of the case. Similarly, the Board considers it appropriate to set out in summary fashion all of the material facts in the case it has heard, prior to ruling on the defences raised by the respondent, so that the parties’ arguments and the Board’s comments on those defences may be rendered more intelligible to persons not directly connected with the case.

3. The complainant, Stanley Gray, has since 1973 been employed as an hourly-paid assembly worker in the Transformer Division of Westinghouse Canada, at its Beach Road plant in Hamilton. He does, however, possess a Bachelor’s degree in Economics and Political Science from McGill, and a Bachelor of Philosophy degree from Oxford. He was in fact a full-time lecturer at McGill until 1969, when he was discharged for his involvement in certain “political” incidents. He was charged under the *War Measures Act* shortly thereafter, and ultimately migrated westward from the Province of Quebec to Hamilton, Ontario. There he spent two years preparing his doctoral thesis until, driven by a desire to eat, as well as his strong beliefs in the goals of the trade union movement, he decided to become, as he put it, “part of the working group”.

4. Given his philosophy, qualifications, and the dedicated nature of his personality, Mr. Gray quickly rose to the forefront of his Local Union group (being Local 504 of the United Electrical, Radio and Machine Workers of America). In 1975 a colleague was seriously injured at work when an overhead crane fell on him, and that started Mr. Gray on a drive for safer work practices in the plant. His colleagues, to that end, elected him a shop steward, and he went on to become secretary of the Stewards’ Council from 1979 to 1982. He was also in 1977 named as a worker representative on the Transformer Division’s joint health and safety committee, where he remained throughout the period covered by this complaint. That committee is a bipartisan one constituted under the provisions of the *Occupational Health and Safety Act*. He also served as Chairman of Local 504’s own Health and Safety Committee for the bulk of the same period. He was temporarily laid off during 1978 and 1979, but returned to his position at the Beach Road plant in September 1979. He was elected a delegate to the Hamilton and District Labour Council, and became secretary of that body in 1982. He is also a member of the NDP at the political level, and sits on that party’s Labour Advisory Committee on Health and Safety, under the chairmanship of MPP Eli Martel. Mr. Gray in 1980 completed a health and safety training course sponsored by the Ontario Federation of Labour, and since that time has taught courses for both the Ontario Federation of Labour and the Canadian Labour Congress. He also writes columns and articles for various newspapers, and does a good deal of reading on his own. While Local 504 of the UE, as bargaining agent for the three Hamilton plants of Westinghouse, participated in and supported Mr. Gray in the health and safety dealings with the company and the Ministry of Labour which have led to this complaint, the union has chosen not to be a party to the complaint itself.

5. The named respondent, Lawrence Bergie, has himself been a Chief Steward in his days with Local 1005 of the Steelworkers’ Union at Stelco, and was a part-time supervisor by the time he left that company. In 1966 he joined the Ministry’s Industrial Safety Branch as an inspector, and in 1975 was made Manager of the region which includes Hamilton and its environs. He reports to the Area Administrator who, at the time, was Earl May. The Area Administrator reports to the Director of the Industrial Health and Safety Branch, who in turn

reports to an Assistant Deputy Minister of Labour. It should be noted that the Ministry's Occupational Health and Safety Division has as well an Occupational Health Branch, which has its own Director and functions through a reporting line entirely distinct from Mr. Bergie's, although ultimately to the same Assistant Deputy Minister. The Occupational Health Branch itself has three divisions, and provides expert and technical resource services to the Industrial Health and Safety Branch, including Mr. Bergie and his inspection staff, as well as to the community at large.

6. The vast majority of the contact between any health and safety representative on a plant committee and the Ministry is through the Inspectors (of whom Mr. Bergie has eight), and that was true in the present case as well. Where unusual problems develop, however, the Inspectors turn to their Manager, Mr. Bergie, for assistance, and he may become involved directly. Here the evidence leaves no doubt that Mr. Gray had, over a considerable period of time, given both his employer and the Industrial Safety Inspectors of the Ministry as much as they could handle, and the involvement of Mr. Bergie (as well as his own superiors) became increasingly frequent, both at the request of Mr. Gray and the union, and of the members of the inspection staff themselves. The essence of the complaint is that in March of 1982, Mr. Bergie, in the course of a tempestuous history of dealings with Mr. Gray and the joint health and safety committee at Westinghouse, threatened to cause the dissolution of that committee and the replacement of all of its existing members by new members. In addition, Mr. Bergie is alleged, in October 1982, to have threatened Mr. Gray with "big trouble" if he had intentions of taking joint committee material to the NDP. The argument is that in both instances Mr. Bergie was acting to protect either the employer, or the Ministry, or both, from being harassed and embarrassed, and to intimidate Mr. Gray into ceasing to pursue his lawful rights. The case then, all parties agreed, was solely one of motivation.

7. As with most unfair labour practice cases coming before the Board, the complainant sought to make out his case of motivation on the basis of indirect evidence. That evidence in this case was comprised of the whole history of dealings between Mr. Gray and the union on one hand, and Mr. Bergie and other Ministry staff on the other, on some of the more major health and safety concerns being pressed for resolution in the Westinghouse plant. The theory of the complainant's case is that Mr. Bergie was so consistently lax and ineffectual in responding to the complainant's concerns that he *must* have been acting in bad faith toward the complainant, and was engaged in a deliberate course of "cover-up" for the health and safety failings of the employer. This bad faith, the complainant argues, must be seen to have underlain the specific threats which are the subject matter of this complaint.

8. There is no simple way to set out the facts of this case. Indeed, it is a tribute to the three counsel involved in the case that the evidence was as intelligible as it was. The case consumed many days of hearings, but more importantly, encompassed a number of separate health and safety issues which overlapped both in time generally and at specific meetings involving Westinghouse and the Ministry's staff. The only way to approach coherency on the facts is to set them out as the Board has found them on the basis of the individual concerns raised by Mr. Gray and the other worker representatives.

9. One final area of comment before doing so, however, is the matter of credibility, particularly with respect to the more critical exchanges between Mr. Gray and Mr. Bergie. Given the quality of other testimony on some points, and the absence of other testimony on others, the Board is of the view that its findings of fact with regard to these exchanges comes

down to weighing the evidence of Mr. Gray and Mr. Bergie themselves. Apart from the normal problem of interested witnesses both perceiving and recounting incidents in a less than neutral way, the Board does not find either of the two main protagonists to have been attempting to fabricate evidence before it. Rather, the question is one of recollection. Mr. Gray not only had his interest confined to incidents at the Westinghouse Transformer Division, but also carried on a practice, in the very face of persons he was arguing with, of taking copious notes of all conversations, some of which he did transcribe and elaborate upon the next day, and others of which remain in their original form. Mr. Bergie, on the other hand, had many health and safety situations to deal with besides Westinghouse, and appeared to be too readily helped by suggestions put to him or the inferences of documents to have a good recollection of his own. One striking example of this was his ready response to counsel for the complainant with respect to the content of a July 12, 1982 memorandum, that recollection, as will be discussed, being at odds with the rest of the evidence and Mr. Bergie's own ultimate recollection. As a general rule, therefore, the Board has preferred the evidence of Mr. Gray over Mr. Bergie where a choice had to be made.

10. One of the early confrontation points arising between the complainant and the Industrial Health and Safety Branch was a serious explosion in the plant on November 29, 1979, which left a young co-worker, Terry Ryan, blind and otherwise permanently damaged. As was quickly ascertained, the explosion was caused by a highly flammable solvent, Toluol, somehow coming to be mixed into a 45-gallon drum of Cromac, a detergent used in cleaning transformers. Mr. Bergie attended at the plant on the day of the explosion with Mr. Gordon, one of his inspectors, and, with Mr. Gray and management, carried out a two-and-a-half-hour investigation, essentially trying to determine how the Toluol, which has special regulations for its storage and use, came to be in the drum. No evidence in that regard was available, however, and Mr. Bergie indicates that he and Mr. Gordon then looked for any violation of the Act they could find. At the back of an adjacent room they found a 45-gallon drum being used to store Toluol. Everyone agreed that Toluol, because of its physical properties, could not be confused with Cromac, but the Regulations under the *Occupational Health and Safety Act* require that no more than one day's usage be kept near other areas, because of Toluol's volatility. Mr. Bergie accordingly ordered that the excess Toluol be removed. Mr. Gray also pointed out some squirt bottles of Toluol being present in the department, and Mr. Bergie orally directed that those be removed as well. Mr. Bergie could not, however, establish a connection between the improper storage of Toluol and its ultimate presence in the Cromac drum, and did not recommend that a prosecution be launched against Westinghouse. Mr. Gray in his testimony stated that he advised Mr. Bergie of indications he had had from employees of the use of Toluol to spray-clean transformers (a particularly hazardous practice in light of Toluol's volatility), but that Mr. Bergie "wasn't interested" and "ignored" him. Mr. Bergie denies that was his attitude. He says he asked Mr. Gray to take him to the places where this had happened, and that Mr. Gray responded that he could not, that he only had rumours at that point. Mr. Bergie then responded that they would have to find proof. Mr. Bergie's testimony is borne out by the ultimate report of the accident issued by Mr. Gray, which reads, in connection with this practice of spray-cleaning:

At the time I had no concrete evidence and it remained only speculation on my part. Mr. Bergie expressed interest in the possibility but said that one would have to have some proof of the practice ...

Mr. Bergie sent Mr. Gordon back into the plant the next day to take statements from Mr. Gray and others, and again on December 19, 1979. As indicated, Mr. Bergie did not find in Mr. Gordon's report sufficient causal connection between the presence and explosion of the Toluol in Mr. Ryan's drum and any practice authorized by Westinghouse to, in his opinion, build a prosecution on.

11. Mr. Gray, however, indicated to Mr. Gordon and to Mr. Bergie himself that he was not satisfied, and that he would be continuing with his own investigation. In a preliminary statement issued in December, after talking to additional employees, he again focussed upon what he considered the careless handling and use of Toluol in the plant generally, but with respect to the accident, said:

However, I do not know if any of the above problems were related to the *specific* accident to Terry and that is because we do not know at the moment why Toluol was in that particular drum. I am not aware of any evidence indicating how and why Toluol ended up in that drum that day.

Mr. Gray then continued to conduct his own investigation, and at the same time was openly critical of the way in which the Ministry had conducted theirs. At a meeting at the Ministry's Hamilton offices on another matter in February of 1980, this tension between Mr. Gray and the Ministry began to surface. Both Mr. Bergie and his superior, Mr. May, were present, and Mr. Gray and Mr. Bergie exchanged some heated words over the adequacy of the Ministry's investigation. Mr. Bergie concluded by saying that it had been decided that in future, Mr. Gray could conduct his own investigations and the Ministry would conduct theirs, and that they would call upon Mr. Gray for his input.

12. It was not until July of 1980 that Mr. Gray completed his 40-page report on the Ryan accident and made it public. But still no specific answer was put forward on the direct question of causation, with respect to the drum which exploded and injured Terry Ryan. As Mr. Gray put it:

Supervision in Dept. 951 and other departments state that they did not instruct any worker to use that equipment in the intervening days. No witnesses have come forth to state any awareness of Toluol being placed in that drum before the accident. Terry clearly states he did not fill the barrel and he was unaware of Toluol ever being used in there to clean with.

This is the mystery of the accident: Toluol was not supposed to be used in the drum in question; no one saw it being placed there, yet sufficient Toluol was in there to cause a major explosion.

Much of the report is then devoted to following up the earlier suggestions of regular use of Toluol in spray-cleaning, and general lack of regard for its hazards in the company's use and training. This, the report argues, made the occurrence of an accident all the more likely; but it did not establish an actual connection. The report also notes the number of alleged unsafe work practices that the company has rectified since the accident, including the elimination of Toluol itself from that particular area of the Division. In a capsule comment, Mr. Gray's report states:

Most of the above changes came about in the weeks immediately following the accident, and resulted from a management re-examination, and also from contributions by the workers in the area, myself and the Ministry of Labour safety officers.

Finally, before moving on, it should be noted that Mr. Gray in his testimony appeared to be suggesting bad faith on Mr. Bergie's part in simply ordering that the Toluol-filled squirt bottles be removed from the "scene of the crime", rather than trying to follow them up as a link to company culpability. Neither the report of Mr. Gray in December nor in July portray the squirt bottles as a serious "lead" in the case, however, and the Board would be hard-pressed to conclude that Mr. Bergie was doing anything more than again issuing remedial directions for any unsafe practices that he observed.

13. Prior to the release of the July report, Mr. Bergie had received a number of telephone calls from members of Terry Ryan's family, entreating the Ministry to take further action against Westinghouse. This was followed up by a telephone inquiry from the Ombudsman's office. Mr. Bergie then discussed the matter with Mr. May, and it was decided that a package would be put together on the accident and submitted to the Legal Branch, so that that Branch could decide whether sufficient evidence existed to launch a prosecution. Mr. Bergie testified that this package was delivered to the Legal Branch well in advance of Mr. Gray's report issuing (and being featured in the Press). Four weeks after Mr. Gray's report issued, the Legal Branch decided in favour of a prosecution, and an information was prepared for Mr. Bergie to swear. As Mr. Gray pointed out (to the Press and the NDP) however, that information contained a number of inaccuracies, and Mr. Gray was able to persuade the Ministry solicitor handling the matter to amend the information. Mr. Gray was consulted on any additional input that he had, and the matter proceeded to trial. After several days of hearing, however, an arrangement was apparently worked out whereby Westinghouse would plead guilty to the improper storage and the presence of squirt bottles, in return for a demand for a lighter sentence (\$5,000, as it turned out). Mr. Bergie was not consulted on this arrangement, nor was the union. The arrangement was, in fact, villified by Mr. Gray and the union in the Press. But the criminal proceedings had come to an end.

14. The Ryan family, meanwhile, had launched civil proceedings against the company. In connection with that, Mr. Gray attended at the Ministry offices in Hamilton to request copies of Inspection Reports issued at Westinghouse while Mr. Gray was on lay-off and therefore not a member of the joint health and safety committee. Mr. Bergie knew that Mr. Gray wanted the reports for the civil proceedings and denied Mr. Gray's request, explaining that there was no authority under the *Occupational Health and Safety Act* for issuing a report on a company to anyone who was not a member of the committee. Mr. Bergie suggested that Mr. Gray approach Mr. May if he were unhappy, but it does not appear that Mr. Gray ever did so.

15. Another issue arising early was the use of "stop-blocks" on crane tracks to protect men while repairing one crane from being struck by another. The worker representatives had raised this concern even prior to 1980, but it became more of an issue in March of 1980, when two crane repairmen narrowly escaped injury from a second crane. The union's concern is noted in the report of the Inspector, Mr. Forrester, at the time, as is the company's assurance that it would henceforth enforce its safety procedures (in accordance with the company manual). Whatever that meant, it is apparent from the evidence that the company did not adopt a practice either of employing stop-blocks or of locking out the other cranes during crane

repairs, and the hazards, from the union's point of view, continued. Around May of 1980 it became known to the union that Stelco had been ordered by the Ministry to either use stop-blocks or lock out the other cranes. The union approached the company with this information, and suggested the order demonstrated that that was now Ministry policy, but the company made no reply. The Stelco decision was subsequently raised by the union with Mr. May and Mr. Bergie in the course of a meeting at the Ministry offices, but, according to Mr. Gray, Mr. Bergie's response amounted to little more than scolding the union for not communicating better with the company.

16. After another near miss in October of 1981, Mr. Gray again raised the stop-block issue on an inspection by a new Inspector, Mr. Baiger. After discussing the Stelco precedent with both parties, Mr. Baiger said to Mr. Gray: "Don't worry, it's Ministry policy, and I'll write it up in a way in which the company will *have* to comply". In his report Mr. Baiger then commented that everyone had agreed that stop-blocks would be used. Mr. Gray submitted to Mr. Bergie an extensive critique of Mr. Baiger's report (as he had done previously with Mr. Forrester) noting what he felt were omissions and mis-statements in the report, and, on stop-blocks, the fact that no agreement had been forthcoming from the company to use them. Mr. Bergie discussed Mr. Gray's critique with Mr. Baiger, and apparently was satisfied that Mr. Baiger had the situation in hand. When the union tried to get the company to install the stop-blocks, however, the company stated flatly that they had never agreed to do so.

17. In January of 1982 Mr. Gray was attending the safety prosecution of NASCO in Hamilton, and encountered Mr. Bergie walking out of the hearing-room. Mr. Gray raised the Stelco decision again and, according to Mr. Gray and Mr. Skinner, another witness called by the complainant, Mr. Bergie responded that Stelco had already had the beams installed for the blocks, and it wouldn't cost them anything. He asked Mr. Gray if he really needed them, in view of the difficulty in carrying them up to the crane, and the expense and interference with operations, and Mr. Skinner responded that they could now be remote-controlled. Mr. Bergie recalls virtually nothing of this conversation, but acknowledges he was abrupt with Mr. Gray that day, having just watched his witness fumble the ball on the witness stand. Mr. Skinner says that Mr. Bergie also indicated he was displeased over some of Mr. Gray's comments to the media, but that the overall atmosphere in the discussion was friendly.

18. On March 16, 1982, another Inspector, Mr. Gordon, attended at the plant for a quarterly inspection, and Mr. Gray again put forward his concerns that no order for stop-blocks had yet been issued, and that the company was refusing to use them. Mr. Gordon thereupon advised the company that that was Ministry policy, and they would have to comply. The company representative responded by raising the cost and the disruption to their existing operation. Mr. Gordon then turned back to Mr. Gray and said: "Well, if I see the work being done without precautions, I'll deal with it then". Mr. Gray responded by pulling a copy of the Stelco decision out of his briefcase, at which point Mr. Gordon became furious, saying: "I knew you had it - you set me up". He then ordered the company to comply with the Stelco decision.

19. The year 1982 also witnessed a heated controversy over two simultaneous concerns in the company's "fab" shop. Once again, the raising of these concerns initially by the union pre-dated 1982. The first concern was over the kind of fumes and particulate being thrown off by the company's arc-welding process. Complaints of irritation to the eyes, nose and throat became more pronounced after the company in early January of 1982 installed cladding on

the outside walls of the building for better insulation. This, according to the union, aggravated what was already a situation of inadequate ventilation. A great deal of evidence was heard on this matter, but in summary form, it can be said that what the union felt was required were general engineering controls to improve the ventilation in the whole shop (thereby controlling paint fumes and lead particulate as well). In response to a written complaint from the union, Mr. Bergie requested the Ministry's Occupational Hygiene Service, through the Hamilton supervisor, Stephen Kwok, to go into the plant and carry out air-sampling tests. The Occupational Hygiene Service is one arm of the Occupational Health Branch, the technical resource service referred to earlier. Mr. Kwok performed the immediate tests he felt were available to him, and as well ordered long-term testing to be carried out as soon as possible. Before that could be done, a work refusal occurred over paint fumes on the paint-line, and Mr. Kwok recommended that respirators be worn until the long-term test results were in. Another work refusal took place on February 3, this time by the crane operator complaining of the welding fumes, but Mr. Kwok sought to demonstrate to him that the fumes only *appeared* worse because the company had gone from white to orange lighting. When the long-term results *were* in, Mr. Kwok was concerned over the high readings of welding particulate at two of the work stations tested, and issued an order for personal protective equipment to be worn at those two stations, pending the opportunity to provide more adequate ventilation generally. The order reads, however, as if its full application is confined to those two stations, and the union was not satisfied. The company was not satisfied either, as they did not feel the samplings justified *any* order.

20. Mr. Kwok also chose to ignore a high reading for oxides of nitrogen in the lab report. His explanation was that he performed his standard test for carbon monoxide, and that showed the welding atmosphere to be generally good. He added that no nitrogen dioxide was found, and that readings for nitrous oxide would appear higher than actual because of interference by oxidants with the test method he had used. Mr. Gray countered, both then and before the Board, with authoritative evidence that carbon monoxide is *never* a by-product of arc-type welding, that the oxides of nitrogen reading displayed a serious health hazard, that a better method of testing existed, and that ozone (a harmful oxide) should have been tested for as well. The controversy once again erupted publicly, culminating with a meeting with Mr. Bergie and Mr. May on March 30, 1982. Mr. Kwok reiterated that in his own experience, carbon monoxide is a good general indicator of the state of the welding atmosphere, and also that in his experience ozone is rarely produced under these circumstances. He said he was not aware of the new testing method that Mr. Gray referred to, and had used the method directed by Head Office. He stated in evidence that so much new material comes in all the time that he is usually limited to trying to keep up with developments on "major" issues in the work place. It should be noted that Mr. Kwok is an engineer and an experienced hygienist, having worked in that capacity in industry for five years, and then for the Ministry for another five years, and is one of only 40 certified industrial hygienists in Canada. The participation of Mr. May and Mr. Bergie at this meeting was generally limited to indicating their support for Mr. Kwok, and Mr. Bergie repeated Mr. Kwok's position that the presence of carbon monoxide in welding would depend on the kind of metal and oxides used. Mr. Kwok confirmed in his evidence that the staff of the Industrial Health and Safety Branch would not have the expertise to interpret the results of the Occupational Hygiene Service reports, and that their role is limited to setting up the appointments, and accompanying the hygienists on their visits. At the March 30 meeting itself, Mr. Gray and the union were not satisfied with Mr. Kwok's explanations and continued to challenge the Ministry's motives. Mr. May finally

threw up his hands in despair, saying to the union: "You don't trust us - we can't deal objectively with you anymore. I'm putting this over to McNair and Basken" (the Branch apparently has a team of "troubleshooters" who attempt to mediate in particularly difficult situations). With respect to the matters in dispute, Mr. May undertook to have further tests conducted. These tests were not to the satisfaction of Mr. Gray and the union, however, and the criticism in the Press continued, particularly over the focus on specific rather than general areas of sampling, and the fact that the follow-up testing occurred in the Spring, when all of the doors and windows in the shop were open. By January of 1983, full engineering controls were put into effect by Westinghouse itself, providing general ventilation for all of the Fab Shop areas, and ending the dispute.

21. One of the offshoots of the controversy over interpreting the welding fume Assessment Report was a dialogue over the use by the union of outside doctors. Mr. Gray himself was concerned about Mr. Kwok's conclusions, particularly in light of the symptoms of the crane operator who refused to work in February, and he and another worker representative, Bill Moore, took the Report to the doctors at the Barton Street Occupational Health Workers Clinic, sponsored by the United Steelworkers of America. The doctors there were extremely troubled by what Mr. Gray presented to them, and their opinion was used by Mr. Gray and Mr. Moore to challenge the conclusions of Mr. Kwok. A number of discussions took place on this point but, reviewing all of the evidence, the Board finds Mr. Bergie in essence to have told Mr. Gray and Mr. Moore that the Ministry had "the best experts and the best equipment in the country", and that they ought not to be challenging those experts. And if they *were* going to go outside, they ought to go to people who knew what they were talking about, not those "cock-and-bull doctors on Barton Street". Mr. Bergie specifically challenged the assertion by Mr. Gray that the doctors at the Clinic were certain that the crane operator's symptoms were caused by a hazard at work. Mr. Bergie pointed out that the doctors at the Clinic were only able to see the man himself, without knowing what exactly he had been exposed to.

22. The related problem in early 1982 in the fab shop had to do with fumes from the spray-paint line, and particularly the Threshold Limit Value (i.e., the safe exposure limit) for a solvent called Solvesso 100. Mr. Kwok had used a TLV of 575, which was the accepted (i.e., A.C.G.I.H.) standard for stoddard solvents. Mr. Kwok explained that Solvesso 100 was a brand name, and that no precise TLV had been established for it. He therefore tried to determine the appropriate parallel based on discussions he had had with the Westinghouse chemist, and an analysis of the data sheets supplied. It was the figure for stoddard solvents that he settled upon, and this was confirmed by the research group at head office.

23. Unknown to Mr. Kwok, however, a data sheet from the Solvesso manufacturer itself, recommending a TLV of 275 for the product, had been issued. Mr. Kwok did not have a copy of that sheet. But Mr. Gray did, and at the March 30, 1982 meeting, after Mr. Kwok completed his explanation of the 575 figure, Mr. Gray, in his own words, "pounced on him". Mr. Kwok indicated that that sheet had never come to his attention, and that it was not Ministry policy to use manufacturers' recommendations in any event, as they would not be enforceable against the employer. Once again Mr. Gray and the union took their story to the media and the NDP, and Solvesso became an issue in the Legislature. At a meeting on September 8, 1982, Mr. Kwok's superior, Mr. Rajhans, gave an undertaking to the union to re-test, with special emphasis, as they requested, on exposure time values. Mr. Kwok and a

member of the Occupational Health Branch's medical staff consequently re-attended on September 23, and re-tested the area of the paint line. When the Report was issued, however, the TLV for Solvesso was once again shown as 575. Mr. Kwok explained in evidence that it was still Ministry policy to use the A.C.G.I.H. figure, but that he had kept the lower figure in his mind when issuing his Report and recommendations. Mr. Kwok's original report of May 1982, in which no orders were recommended to be issued, eventually reached the Director of the Industrial Health and Safety Branch, Mr. Melnyshyn, on appeal in December. Mr. Melnyshyn dismissed the appeal on the basis that no order had been justified at the time on the TLV then considered to be acceptable. His decision notes, however, that the Ministry adopted the figure of 275 for Solvesso 100 as of November of that year.

24. Another concern had to do with the possibility of toxic effects on workers who are required from time to time to work on transformer cores inside the tank while the tank is still hot. Mr. Gray had no information as to what kinds of fumes, and at what levels, workers were being thus exposed to, but he was made aware of occasional complaints of sore eyes and throats, and dizziness. He first attempted to get information from the company on the oil and related substances in use in the tanks through Mr. Forrester on an inspection in January of 1980. Mr. Forrester was told by the company that a report was in the process of being prepared. A critique of Mr. Forrester's inspection report by Mr. Gray subsequently went to both Mr. Bergie and Mr. May, and was discussed at a meeting the next month. The company stated that it was meeting shortly to decide on "prompt" release of the information. In April Mr. Gray gave Mr. Forrester a written list of the items upon which he was waiting for company information, and "hot oil fumes" was included. With no company response forthcoming, Mr. Gray again raised the matter with Mr. Gordon in September. The company advised Mr. Gordon that it was in the process of purchasing new testing equipment which gave immediate results, and that it had been cooling and testing the tanks before entry, but not keeping a permanent record of the results. The regulations for "confined spaces" require a permanent record, and Mr. Gordon issued an order to correct that. The company also stated that it was developing its own list of priorities for the release of information, and Mr. Gordon reminded them of their obligations under the *Occupational Health and Safety Act* to provide information to the committee. At a meeting in October of 1980 Mr. Bergie was presented with a list of demands to the company by Mr. Gray, and Mr. Bergie said to Mr. Gray that if he presented a more reasonable list of demands, he might get somewhere. In November the company finally produced a fact sheet on the tanks which, under "Health", said only: "Do not breathe oil mists". Mr. Gray said that that was exactly what he had been concerned about, and continued to press for more specific information.

25. When Mr. Gordon returned for an inspection in January 1981, Mr. Gray reviewed the history of the matter and accused the company of lying and stalling. Mr. Gordon appeared exasperated with the company and said the *Ministry* would get the information itself. Mr. Gordon phoned Mr. Bergie on the spot to put in the request, and then proceeded to take a sample of the oil in the tank. Mr. Gray testified, however, that no further information was received from the Ministry.

26. In March of 1981, a worker passed out after being inside one of the tanks when hot. Mr. Gray carried on extensive discussions with the company and with the Canadian Centre for Occupational Health, but not with the Ministry. When Mr. Gordon arrived for an inspection in April, Mr. Gray had enough information to show him that the company had been failing to disclose information that was already available. Mr. Gray says that Mr. Gordon then

blew up at the company, and began to lecture them on the “internal responsibility system”, discussed *infra*. The inspection report itself, however, Mr. Gray points out, criticizes *the union* for not accepting the company’s information. There is no evidence of Mr. Gray following this up with Mr. Bergie.

27. Mr. Gray then began to press more forcefully for representative air samplings to determine the levels of exposure at the various stages of working with the tanks. He discussed this with Mr. Baiger during the several days of his inspection in October 1981, but Mr. Baiger, according to Mr. Gray, missed the point. When a work refusal later in the month brought Mr. Gordon and other Ministry personnel in, Mr. Gray pointed out that the Ministry tests taken at Mr. Baiger’s request were useless because they were taken with the core cold, and outside the tank. The concern Mr. Gray had was the hazard a worker would be exposed to working with the core *inside* the tank, when the transformer core was hot. Mr. Gray put this in his critique of the Baiger report that he sent to Mr. Bergie in December, but, as noted earlier, received no formal reply. On January 5, 1982, however, a contract consultant with the Ministry was assigned to go to Westinghouse and ascertain Mr. Gray’s concerns. The consultant spent several hours with Mr. Gray going over these concerns, and then, according to Mr. Gray, still got them wrong in his report. Mr. Gordon was also present for the discussion and indicated that he wanted the new tests taken when Mr. Gray was on shift. The tests were carried out at the end of January, during an afternoon when Mr. Gray was not on shift. The core was tested cold, and outside the tank.

28. As mentioned, Mr. Gray encountered Mr. Bergie at the NASCO trial on January 27, 1982. This was immediately after the Ministry tests just referred to, and Mr. Gray said: “What the hell are you guys doing – you’re still testing empty tanks”. Mr. Bergie replied that he was not aware of that, and that he would get it straightened out.

29. Nothing happened immediately, however, and in March the union went over Mr. Bergie’s head on this and the stop-block problem, arranging a meeting with Mr. J. McNair, who was at that point the Director. Mr. McNair became angry with Mr. Gray, however, and left the meeting. The next day Mr. Bergie was sent in to discuss Mr. Gray’s concerns. Mr. Gordon was also present and tabled the Ministry’s January oil fumes Report. Mr. Gray said: “Of course it doesn’t show a problem – you took the wrong test”. Mr. Gray once again stated his concern, and Mr. Bergie responded that the Ministry was being asked to test inside tanks that no one goes into. No resolution was reached at that meeting.

30. The union then wrote to Mr. May to set up another meeting, and that took place on March 30th. Both Mr. May and Mr. Bergie were there, along with Mr. Kwok, whose staff had conducted the earlier tests now in dispute. Mr. May insisted that the tests *had* been conducted on hot tanks, so all parties went over the Report together. The Reports disclosed that no hot tanks were tested. Mr. Metangha, the technician who conducted the tests on Mr. Kwok’s instructions, was then called into the meeting and asked why no tests were conducted inside the tanks. Mr. Metangha stated that no one had been working inside a tank when the test group arrived, and that no one in his group had the training to enter the hot tanks themselves. And he said they were unable to find an employee who would take their sampler in for them. Mr. Kwok, who had been the Ministry spokesman on this issue, then dismissed Mr. Metangha from the meeting. He explained to the Board that responsibility for the testing had been his, and that he had fully understood the union’s request, but that it was his belief that the company did not let anyone enter the tank while it was hot. He testified that he did not know

where he got that information from, but that it was "in his mind". Mr. Bergie, in any event, took over the discussion by indicating that the tanks were "confined spaces", and that no employee should be entering a tank without it being tested and certified, as the Regulations required. Mr. Gray stated that that was an unreasonable demand on the company, since the equipment could not give results that quickly, and that it made more sense to take representative samples and see what the exposure was. But the other union representatives present cut Mr. Gray off, and said Mr. Bergie should be taken at his word. The discussion ended on that note.

31. The company did not test tanks before each entry, and in September of 1982, Mr. Gray made an issue of it again on an inspection with Mr. Gordon. Mr. Gray referred to what Mr. Bergie had said, and everyone said that that was impossible. Mr. Gordon agreed to issue a new order as a result, and the company adopted a procedure of certifying tanks safe before entry. Mr. Gray says the problem with tanks has not recurred since.

32. The final problem dealt with in these proceedings was the question of lead control. Lead was the first substance to be regulated under the "designated substance" provisions of the 1978 *Occupational Health and Safety Act*, and the Branch was in the process during the period covered by this complaint of developing its own guidelines for dealing with it. No worker had yet been identified with high lead levels in the blood, but Mr. Gray was concerned that the company had yet to carry out a "lead assessment" on its exposure levels, as required by the Regulations. He first raised the concern with the Ministry in March of 1982, on an inspection visit by Mr. Gordon. Mr. Gordon issued an order in standard form, simply quoting that portion of the Regulations which require the company to carry out its "lead assessment", in consultation with the joint committee. The company in April carried out air samplings for lead on the paint line, and its Report was released to the committee at the end of June. The results showed levels three times the acceptable limits, but the company said that the situation was adequately controlled by the use of respirators. Mr. Krouse, the union's business agent, telephoned Mr. Bergie at about this time, and indicated to him that the union wanted a meeting with the Director. He did not provide Mr. Bergie with very much detail on the subject of his concern, as the union had been frustrated in the past at their inability to reach the Director personally with their concerns. The major point in the discussion was the Ministry's air-sampling assessment report on the welding fumes, discussed earlier, but the complainant insists that the lead concern would have been mentioned also. Mr. Bergie's memorandum of the telephone call does reflect an element of confusion, and it may be that Mr. Krouse himself, whom Mr. Gray admits had to be briefed for the call by Mr. Gray, was not as clear as he might have been (Mr. Krouse was ill and did not testify). In any event, the Board is satisfied that Mr. Bergie and the Ministry did not become aware of the company's lead readings until Mr. Gray raised them himself with Mr. Gordon on August 25th. A meeting was then arranged in short order by the Ministry, and took place on September 8th. That meeting was attended by Mr. May, Mr. Bergie and Mr. Rajhans, Chief of the Occupational Health Branch's Occupational Hygiene Service. It was Mr. Rajhans doing the talking, as the parties discussed lead and Solvesso 100 (which was still an issue as of that date). The meeting concluded with Mr. Rajhans undertaking to have his staff come in and test on both lead and Solvesso 100, with special attention to short-term exposure limits.

33. Before that occurred, however, the company released a second set of paint-line results, taken in August with a different colour paint in use, and these results showed readings six times the acceptable limit for lead. Mr. Gordon arrived for another quarterly inspection

at about this time, and was promptly directed by Mr. Gray to the latest test results. As a result, Mr. Gordon's Report of September 15, 1982 included an order for submitting a lead assessment and some form of lead-control program, with a deadline of October 6 set for compliance. On September 23rd, Mr. Gordon came to the plant with Mr. Kwok to carry out the testing that Mr. Rajhans had promised, including lead. Mr. Gray objected, saying that the company tests themselves left no doubt that a full order for lead-control was required, and should be issued without waiting for the Ministry now to take its own tests. Mr. Gordon refused to issue the order, however, and Mr. Gray once again took his case to the public, delivering a brief to the NDP Task Force on Occupational Health (which began to look at the Westinghouse situation as a test case for the new lead-control regulations), and appearing on radio and television with Eli Martel. Mr. Martel, at the same time, took the issue to the floor of the Legislature, and kept it there. The company had forwarded to Mr. Bergie on October 1st a draft assessment letter, and Mr. Bergie, who indicated it was the first of its kind that the Branch had had to deal with, passed it on to the Occupational Health Branch to determine its adequacy. Mr. Gray publicly criticized Mr. Bergie, however, for even accepting the letter, which he viewed as inadequate. As well, the paint that was in use the day that Mr. Kwok had come in to do the Ministry's tests had the lowest lead content in the plant. Mr. Kwok testified that the arrangement made with the company by Mr. Rajhans at the September 8th meeting was for the Ministry to be called in the next time the spray paint line was being run, and Mr. Kwok simply responded to the company's call. The Report of the samplings which Mr. Kwok took, released in October, showed all readings below the acceptable level, in contrast to both findings which the company had previously announced.

34. Mr. Gray was seeking to document for the NDP his charge of the lowest level of lead paint having been tested, and apparently went to the stockroom one day while at work to examine the paint can labels. The company took the position that this was improperly done during work-time and, in light of earlier warnings, issued Mr. Gray a suspension. Mr. Martel elected to make this as well an issue in the House, and the Minister of Labour undertook to inquire into it. Immediately thereafter, Mr. Bergie found himself convening a meeting at Westinghouse to discuss the basis of Mr. Gray's discipline. Mr. Gray, who had already initiated proceedings through the proper channels provided under the *Occupational Health and Safety Act*, did not take kindly to Mr. Bergie's questions, and the meeting turned quite hostile. Mr. Gray did, however, concede that he was seeking the information off the paint labels for the use of both his committee and the NDP. Later in the meeting, the discussion turned to other unrelated information which Mr. Gray had been pursuing the company to turn over to the committee, and Mr. Bergie said: "You'd better not be giving that to the NDP, or there'll be big trouble". Mr. Gray vigorously defended his right to do so, and this "threat" by Mr. Bergie forms one of the two bases of complaint underlying these proceedings.

35. The combined controversy over lead and Solvesso 100 led to a request from the top levels of the Ministry to the Assistant Deputy Minister responsible for the Occupational Health and Safety Division, Dr. Anne Robinson, to inquire into and submit a report on the activities of the Ministry and of Westinghouse in connection with both lead and Solvesso 100. Her Report issued in November of 1982, and essentially found no fault in the handling of either concern. On lead, in fact, the doctor stated that Westinghouse had in fact "gone beyond" what was required by the regulations in the way of consultation with the joint committee. Mr. Gray quickly branded the Report a "whitewash". The political activity continued and Mr. Gray wrote to Mr. Bergie, as Mr. Bergie suggested, outlining in detail his points of appeal against the company's lead assessment of October 1st. Mr. Bergie upheld Mr. Gray's

appeal on all points in early January. And then, after a meeting with Mr. Gray and the full union leadership, the Minister of Labour, and top Ministry staff on January 10, 1983, Westinghouse put into effect a full lead-control program and ceased altogether the use of lead-based paints in its spraying operation.

36. Mr. Gray alleges, incidentally, that Mr. Bergie allowed the company to renege on an arrangement he says was worked out with the company in 1980 on one aspect of the "internal responsibility system", and that was the calling in of health and safety representatives from off-shift, if necessary, in order that they be able to accompany the Inspector anytime he arrived for an inspection. Mr. Gray says he complained to Mr. Bergie about the company's refusal to do this in the latter stages of 1981, and Mr. Bergie said that the company did not have to call someone in from off-shift, and that the company was perhaps unwilling to pay their safety representatives overtime. Mr. Bergie suggested that substitutes on other shifts be designated to allow for such occurrences. Reviewing all of the evidence, it is clear that an arrangement *was* worked out with the company, in October of 1980, with the help of Mr. Forrester, for one health and safety representative to be designated for each of the three areas of the Division, and that the appropriate representative would then accompany the Inspector on that portion of his tour. This was worked out to overcome an impasse between the company and the union as to who was entitled to choose which of the various worker representatives was to accompany the Inspector. While Mr. Gray may have subsequently viewed the calling of safety representatives in from off-shift as a logical extension of this arrangement, that does in fact raise a different issue, and not one that appears on the documentation to have been addressed by Mr. Forrester at the time. Mr. Bergie's position, we note, is consistent with that taken by Mr. May on March 30, 1982, and with the written opinion from the Legal Branch of the Ministry which the evidence indicates was being circulated internally at that time.

37. That completes the canvassing of those concerns of Mr. Gray highlighted in these proceedings. It is necessary to again backtrack in time to deal with the events of March 17 and 19, 1982, which form the core of these proceedings. Mr. Gray had long been accusing the company of bad faith in attempting to mislead and conceal information from the joint health and safety committee, and by early 1982, allegations of collusion on the part of Ministry staff were being voiced by him as well. The joint committee meeting of February 25, 1982, was a particularly antagonistic one, with Mr. Gray reiterating a long list of demands unfulfilled by the company, and charging both the company and the Ministry with bad faith. All of these comments were reproduced in the committee's Minutes of that meeting. It is part of the process of inspection for the Inspector to review the Minutes of monthly joint committee meetings, and when Mr. Gordon did so in March, he was extremely upset. Mr. Gordon went to Mr. May, and Mr. May told Mr. Bergie to go in and "tell them what the internal responsibility system was all about", and that if they had any complaints about the Ministry, they should direct those complaints to the supervisors of the people in question. Mr. Bergie did that the next day, at a meeting of the joint health and safety committee. Mr. Gray was absent at the time, but Mr. Bergie reiterated his comments to Mr. Gray and the committee two days later. We find Mr. Bergie to have essentially berated the committee for its confrontational style, and to have said that the committee was not functioning in any way like it should. Mr. Baird, one of the worker representatives present the first day, agreed with him that the committee was not working. Mr. Bergie said that he and Mr. May had been to Mr. McNair and had found a way to petition the Minister to dissolve the committee, unless the people on the committee

could “come up with something else”. He also stated that if the Minister dissolved the committee, those presently involved would never sit on a committee again. To the union he said that a lot of their concerns in the February 25th Minutes were “crap”, and that the committee should not be inundated with complaints that the committee had no jurisdiction to deal with. He also said that if the union had any criticisms to make of the Ministry, they should make them to the people in charge, who could do something about them. Mr. Gordon had also complained to Mr. Bergie that morning about the amount of time he often had to wait for Mr. Gray to appear before he could begin an inspection, and Mr. Bergie said to Mr. Gordon at the meeting that he was henceforth to wait fifteen minutes for Stan Gray to show, and then get on with his job at some other plant.

38. Mr. Bergie explained to the Board his rationale for the threat to disband the committee. He testified that having tried everything else to remove the atmosphere of confrontation from this particular joint committee, it occurred to him at the meeting to try this tactic as a last resort. He said he had hoped it might “shock” the committee into trying to work things out, and that in 100 per cent of the other cases in which he found it appropriate to mention the Minister’s name, it had had that effect on the parties. He said it was never his intention to actually seek to carry out the threat, and it was never raised again. Until this complaint.

39. The respondent has, as noted, raised a number of “preliminary objections” to the complaint which he had, in light of the nature of the objections, and a desire to have a full airing of the case, elected to leave aside until final argument.

40. The first such argument goes to the Board’s jurisdiction to hear the case at all. The submission is that the activities of Mr. Gray as a health and safety representative is conduct contemplated and regulated under the *Occupational Health and Safety Act*, and not “protected activity” under the *Labour Relations Act*, as envisaged, for example, in *Adams Mine*, [1982] OLRB Rep. Dec. 1767. Counsel points to section 33(5) of the *Occupational Health and Safety Act*:

33.-(5) No person shall knowingly,

- (a) hinder or interfere with a committee, a committee member or a health and safety representative in the exercise of a power or performance of a duty under this Act;
- (b) furnish a committee, a committee member or a health and safety representative with false information in the exercise of a power or performance of a duty under this Act; or
- (c) hinder or interfere with a worker selected by a trade union or trade unions or a worker selected by the workers to represent them in the exercise of a power or performance of a duty under this Act

and also sections 32(1) and (5):

32.-(1) Any employer, constructor, owner, worker or trade union which considers himself or itself aggrieved by any order made by an inspector under this Act or the regulations may, within fourteen days of the making

thereof, appeal to a Director who shall hear and dispose of the appeal as promptly as is practicable.

• • •

(5) In this section, an order of an inspector under the Act or the regulations, includes any order or decision made or given or the imposition of any terms or conditions therein by an inspector under the authority of this Act or the regulations or *the refusal to make an order or decision* by an inspector

(emphasis added)

in support of his contention that if any remedy at all is contemplated by the Legislature for the conduct complained of here, it is contemplated within the prosecution and appeal sections of the *Occupational Health and Safety Act* itself. And counsel points to section 2(2) of that Act:

2.-(2) Notwithstanding anything in any general or special Act, the provisions of this Act and the regulations prevail

in support of his contention that the remedies provided under the Act are exclusive ones. This is reinforced, he submits, by the fact that the remedy sought in this case is essentially declaratory in nature.

41. It strikes the Board that, while many of the rights exercised by Mr. Gray in this case may have been rights set out in the *Occupational Health and Safety Act*, they need not have been. Many collective agreements contained language in varying degrees dealing with health and safety prior to the enactment of any significant legislation in the field, and the Westinghouse collective agreement still does so today. Had a complaint come to the Board of an employer seeking by intimidation or coercion to circumscribe the lawful activities of a union safety committee member, prior to the time that health and safety legislation had been passed, it is difficult to conceive of an argument that the *Labour Relations Act* did not confer jurisdiction to deal with the complaint. In the absence of a finding such as in *Seneca College v. Bhadauria*, (1981) 2 S.C.R. 181, then, that the legislation provides its own exhaustive code of remedies, it would seem probable that the passage of the *Occupational Health and Safety Act* did no more than establish a parallel avenue of relief to the *Labour Relations Act*. It must be remembered that the Board does, however, have an independent discretion under the language of section 89 as to whether or not it considers it appropriate to assume jurisdiction over a particular complaint. The present matter does *not* involve the classic case of intimidation between an employer and an employee, but rather of alleged intimidation on the part of a public officer mandated to carry out the purposes of the *Occupational Health and Safety Act*. Were the same situation to be before the Board again, and the issue of jurisdiction put before the Board at the outset, the Board might well decide that the appropriate place for a case dealing with enforcement of the *Occupational Health and Safety Act* is under that Act. The present matter having been fully litigated on the merits, however, the Board is not now inclined to entertain any argument for deferral. Given the view that the Board takes of those merits, the Board is also prepared to assume that the complainant is correct in its assertion that the Board has jurisdiction.

42. In light of the fact that the *Labour Relations Act* is not expressly made binding on the Crown, the respondent also raises as a complete defence section 11 of the Ontario *Interpretation Act*, which provides:

No Act affects the rights of Her Majesty, Her heirs or successors, unless it is expressly stated therein that Her Majesty is bound thereby.

That section, the complainant's cases demonstrate, has been construed narrowly so as to extend immunity for Crown servants only to acts authorized expressly or by necessary implication by statute or their superiors. See, e.g., *Regina v. Stadiotto*, (1973) 11 C.C.C. (2d) 257 (Ont. C.A.). The complainant's counsel accordingly asks the Board to find that Mr. Bergie, in making the statements that he did, was acting in an unauthorized way, and on a "frolic" of his own. There is a note of inconsistency, however, between that argument and the complainant's own testimony. The complaint itself was filed in conjunction with a Press Release from Mr. Gray and Mr. Martel, and Mr. Gray quickly acknowledges that one of the complaint's purposes was to put pressure on the government to change its policies. He testified that it was his belief that "the Ministry" and Westinghouse were "in bed together", and that he hoped this complaint would bring an end to the Ministry's partisanship. He said he felt the problem was the "lack of political will" by the government to take on large employers, and that Mr. Bergie was simply carrying out Ministry policy. Even with respect to the complaint's central allegation, the threat of dissolving the committee, Mr. Gray said that he did not believe that that had come from Mr. Bergie's own personality; rather, he felt that the whole thing had been thought out "higher up". He said he believed that Mr. Bergie was used as "the stick", and then Basken and company "as the carrot". All of this is Mr. Gray's speculation only, and is not supported by the evidence of even the respondent himself. But it was, after all, Mr. Gray who filed the complaint, and, in the context of Crown immunity, it is interesting to note, from his point of view, who the object of the complaint really was. Once again, however, the Board need not decide the issue in those terms, in light of its view on the merits.

43. There are, similarly, qualified defences raised on the basis of section 36(1) of the *Occupational Health and Safety Act*, which reads:

36.-(1) No action or other proceeding for damages, prohibition, or mandamus lies or shall be instituted against a Director, an inspector, an engineer of the Ministry, a health and safety representative, a committee member, a worker selected by a trade union or trade unions or a worker selected by the workers to represent them for an act or an omission done or omitted to be done by him in good faith in the execution or intended execution of any power or duty under this Act or the regulations.

and of section 11 of the *Public Authorities Protection Act*, which reads:

11.-(1) No action, prosecution or other proceeding lies or shall be instituted against any person for an act done in pursuance or execution or intended execution of any statutory or other public duty or authority, or in respect of any alleged neglect or default in the execution of any such duty or authority, unless it is commenced within six months next after

the cause of action arose, or, in case of continuance of injury or damage, within six months after the ceasing thereof.

But once again, in light of the Board's view of the merits, the application of neither of these provisions need be considered.

44. Consideration of those merits must begin with a discussion of the "internal responsibility system", and its relationship to the *Occupational Health and Safety Act* itself. Section 8 of the Act provides:

8.-(1) ...

(2) Subject to subsection (3), where,

- (a) twenty or more workers are regularly employed at a work place;
- (b) a regulation made in respect of a designated substance applies to a work place; or
- (c) an order to an employer is in effect under section 20,

the employer shall cause a joint health and safety committee to be established and maintained at the work place unless the Minister is satisfied that a committee of like nature or an arrangement, program or system in which the workers participate is, on the date this Act comes into force, established and maintained pursuant to a collective agreement or other agreement or arrangement and that such committee, arrangement program or system provides benefits for the health and safety of the workers equal to, or greater than, the benefits to be derived under a committee established under this section.

(3) Notwithstanding subsections (1) and (2), the Minister may, by order in writing, require a constructor or an employer to establish and maintain one or more joint health and safety committees for a work place or a part thereof, and may, in such order, provide for the composition, practice and procedure of any committee so established.

(4) In exercising the power conferred by subsection (3), the Minister shall consider,

- (a) the nature of the work being done;
- (b) the request of a constructor, an employer, a group of the workers or the trade union or trade unions representing the workers in a work place;
- (c) the frequency of illness or injury in the work place or in the industry of which the constructor or employer is a part;

(d) the existence of health and safety programs and procedures in the work place and the effectiveness thereof; and

(e) such other matters as the Minister considers advisable.

(5) A committee shall consist of at least two persons of whom at least half shall be workers who do not exercise managerial functions to be selected by the workers they are to represent or, where there is a trade union or trade unions representing such workers, by the trade union or trade unions.

(6) It is the function of a committee and it has power to,

(a) identify situations that may be a source of danger or hazard to workers;

(b) make recommendations to the constructor or employer and the workers for the improvement of the health and safety of workers;

(c) recommend to the constructor or employer and the workers the establishment, maintenance and monitoring of programs, measures and procedures respecting the health or safety of workers; and

(d) obtain information from the constructor or employer respecting,

(i) the identification of potential or existing hazards of materials, processes or equipment, and

(ii) health and safety experience and work practices and standards in similar or other industries of which the constructor or employer has knowledge.

(7) A committee shall maintain and keep minutes of its proceedings and make the same available for examination and review by an inspector.

(8) The members of a committee who represent workers shall designate one of the members representing workers to inspect the physical condition of the work place, not more often than once a month or at such intervals as a Director may direct, and it is the duty of the employer and the workers to afford that member such information and assistance as may be required for the purpose of carrying out the inspection.

(9) The members of a committee who represent workers shall designate one or more such members to investigate cases where a worker is killed or critically injured at a work place from any cause and one of those members may, subject to subsection 25(2), inspect the place where the accident occurred and any machine, device or thing, and shall report his findings to a Director and to the committee.

(10) A constructor or an employer required to establish a committee under this section shall post and keep posted at the work place the names and work locations of the committee members in a conspicuous place or places where they are most likely to come to the attention of the workers.

(11) A committee shall meet at least once every three months at the work place and may be required to meet by order of the Minister.

(12) A member of a committee is entitled to such time from his work as is necessary to attend meetings of the committee and to carry out his duties under subsections (8) and (9) and the time so spent shall be deemed to be work time for which he shall be paid by his employer at his regular or premium rate as may be proper.

(13) Any committee of a like nature to a committee established under this section in existence in a work place under the provisions of a collective agreement or other agreement or arrangement between a constructor or an employer and the workers, has, in addition to its functions and powers under the provisions of the collective agreement or other agreement or arrangement, the functions and powers conferred upon a committee by this section.

(14) Where a dispute arises as to the application of subsection (2), or the compliance or purported compliance therewith by an employer, the dispute shall be decided by the Minister after consulting the employer and the workers or the trade union or trade unions representing the workers.

As can be seen, the establishment of a joint health and safety committee for operations of any substantial size is *mandatory*, and the Legislature has provided a number of measures to ensure that such committees can play a constant and meaningful role in the work place. This would appear to reflect a legislative recognition that, ideally at least, industrial health and safety in many of its aspects can best be achieved through the joint efforts and awareness of the people most directly involved in the day-to-day operation of that work place. As Professor Katherine Swinton put it, in her article entitled: "Regulating Occupational Health and Safety: Worker Participation Through Collective Bargaining and Legislation" in *Essays in Collective Bargaining and Industrial Democracy*, edited by Geoffrey England. Don Mills, Ont.: CCH, c 1983; p. 43, at page 51:

With the rising toll of injury and disease came concern about the effectiveness of existing regulatory and enforcement mechanisms. The inspectorate seemed unable to monitor workplace conditions adequately, for the number of inspectors was small, and consequently, the frequency with which they could visit worksites was limited. Even if the number of inspectors and inspections were to be increased (with a necessary increase in public expenditure), inspections can never be an adequate prevention mechanism, for the workplace in compliance with regulations today may be in violation tomorrow because of faulty equipment or careless housekeeping.

The concept of an "internal responsibility system" built around these mandatory joint committees is accordingly embodied in the Ontario Ministry of Labour's operating manual for health and safety Inspectors, which begins its instructions on the system as follows:

1.1 Philosophy

Internal Responsibility System Cyclical Review

Employers and employees have the primary responsibility for occupational health and safety. The establishment of an effective Internal Responsibility System is an essential first step to prevent injury or health deterioration. As an Internal Responsibility System improves, the level of compliance will move from enforced compliance, through self-compliance to ethical compliance.

To encourage this Internal Responsibility System to develop, the role of facilitator has been given to the Inspector, who will identify, evaluate and review the actions of labour and management on a regular basis. This will facilitate that first step by identifying areas where the Internal Responsibility System can be improved...

45. The internal responsibility system has, as well, been discussed, together with its obvious limitations, in numerous reports and articles. As the parties noted, one of its early proponents was James Ham, who, in his 1976 *Report of the Royal Commission on the Health and Safety of Workers in Mines*, had this to say:

... Industry and labour have expressed deep concern not only about the facts of industrial disease and injuries from accidents but also about the effectiveness of the institutional arrangements between government, industry, and the workers for dealing with the hazards at work and about governmental policy for occupational health and safety that such arrangements reflect.

• • • •

Within the internal responsibility-system at the company level, which is the key to the quality of the over-all control of occupational hazards, there has been in many companies an inadequate opportunity for workers to contribute their insight to the assessment of work conditions and to the basis on which management makes decisions on issues of health and safety. The adamantly confrontational character of Canadian labour-management relations has deterred the creation of sensible arrangements for worker participation. Questions of health and safety are not suitable issues for collective bargaining. The Commission has carefully defined a framework for the operation of joint labour-management health and safety committees as bodies contributive to the formulation and review of sound managerial policies and practices....

The hope was, and continues to be, that on matters of health and safety the parties in a unionized institution might be able to divorce themselves from the adversarial approach characteristic of collective bargaining in this jurisdiction. As the more recent *Report of The Joint Federal-Provincial Inquiry Commission into Safety in Mines and Mining Plants in Ontario* (the Burkett Commission) observed, at page 86:

... The challenge for the parties, therefore, is to develop the capability to deal with day-to-day health and safety concerns in a co-operative and consultative manner within the context of a free collective bargaining system....

The joint health and safety committee is the mechanism through which the parties can achieve this desired capability. A properly structured and functioning committee allows the parties to insulate the health and safety effort from the other more adversarial aspects of the relationship.

And further, in attempting to account for the shortcomings which prompted its study into the mining industry, the Commission noted, at page 117:

... By failing to monitor the performance of the joint health and safety committees adequately, the branch is missing the opportunity to pinpoint potential substandard situations before they are revealed by visual inspection of the workplace or accident statistics.

If the branch is to play the role of facilitator and act as a resource for the direct responsibility system, it must develop the capability of identifying and responding to relationship breakdowns. The identification of human relations difficulties will fall to the inspection staff who are in direct personal contact with the various mining operations. The Industrial Health and Safety Branch – another branch in the ministry's Occupational Health and Safety Division – has developed an inspection procedure designed to assess the attentiveness of the internal participants. We are of the view that this procedure has considerable merit and can be applied within the mining industry.

46. The "internal responsibility system" is not, of course, without its limitations. The Ham Commission itself closed its Report with reference to "the objective of a sound balance between *self-regulation* and *legal compulsion* based on the constructive co-operation of all parties" (emphasis added). Joint health and safety committees can only monitor and make recommendations: as Professor Swinton, cited *supra*, points out, the scheme established by the Legislature does not envision an equality between the parties. Only management possesses the right to implement changes, and it continues to be the function of the Industrial Health and Safety Branch to ensure compliance with the Act when the outer limits of the "internal responsibility system" have been exhausted. But the point at which that limit is reached is a matter of judgment, and the Labour Board clearly was not meant simply to second-guess that judgment on the part of the responsible officials under the *Occupational Health and Safety Act*. The two counsel for the complainant have emphasized time and again that that is not the purpose of the complaint. The complaint is directed solely at the threatening statements made by Mr. Bergie in March and October of 1982, and the remainder of the evidence, pertaining

to the specific health and safety concerns of Mr. Gray, is simply argued to establish for the Board the necessary element of bad faith or improper motivation under section 70.

47. What does that other evidence, concerning the response of Mr. Bergie's office to Mr. Gray's concerns, tell us about the motivation of Mr. Bergie himself? Counsel for Mr. Bergie fairly concedes that not everything the Branch did with respect to Westinghouse was letter perfect, and that Mr. Gray did not always get all of the attention he might have deserved. But he also points out, equally fairly we think, that, unlike Mr. Gray, Westinghouse was not the only plant that Mr. Bergie and his staff had to be concerned about. Mr. Bergie has 3,000 establishments under his jurisdiction, and a regular staff of eight inspectors to serve them. Anyone familiar with the east end of Hamilton is aware of the size of a good many of those establishments. Each operation must be visited quarterly on a routine inspection basis, and then beyond that, inspectors are required to attend at an establishment to deal with special requests, accidents, and work refusals, and to co-ordinate the activities of the Occupational Health Branch. Taking an average from the evidence of the various inspectors, this appears to involve each inspector in some 300 to 400 inspection visits per year. Presumably the averaging in of numerous smaller establishments renders it possible to meet these requirements at all.

48. While Mr. Bergie may, as we have noted, become involved in varying degrees in a particular safety matter, his general perception of what is going on at each work place is obviously very much dependent on the reports (both oral and written) of his inspectors, and the advice of his experts. In the testing of welding fumes and Solvesso 100, for example, Mr. Bergie's role was clearly no more than tangential to the activities of the Occupational Hygiene Service, whose performance is beyond both his qualifications and his direct authority to control. To the extent he played any overt role in the discussion of those issues, it was merely to reiterate the positions which his experts assured him were correct. Mr. Kwok, for example, is an industrial hygienist with well-established credentials, and one who, Mr. Bergie observed, has "never been known to turn down a request", because of his commitment to health and safety in the workplace. Those positions were also, to varying extents, placed under the scrutiny not only of Mr. Bergie but of Mr. May, Mr. Rajhans, the Director, and Dr. Robinson, and were considered credible. Lead was also an issue in which Mr. Bergie's expertise and involvement was limited, and by the time the existence of a clear problem was brought to the attention of the Industrial Health and Safety Branch in late August of 1982, it quickly became the subject of considerable scrutiny by the levels above Mr. Bergie as well. Certainly no bad faith can be imputed to Mr. Bergie himself for the failure of the Occupational Hygiene Service to test for lead when they were in in May (even if the complainant is correct and Mr. Bergie should have been aware of the first company results in *July*), and the Inspector, Mr. Gordon, issued an order for immediate compliance with the lead assessment regulations as soon as he received the company's second test results in September. Evaluation of the company's draft lead assessment under the new regulations was clearly a matter beyond Mr. Bergie's expertise, and he did ultimately uphold Mr. Gray's appeal in its entirety, albeit in the light of the on-going publicity.

49. The issue of testing inside hot tanks took a distressingly long time to resolve, but the evidence, including Mr. Gray's own evidence, establishes clearly that the individuals from the Ministry upon whom Mr. Bergie would have been relying, such as Dr. Tidey and Mr. Kwok, either did not understand what Mr. Gray's actual concern was, or did not believe that the entry into hot tanks was a genuine problem. After Mr. Gray complained directly to Mr.

Bergie in his critique of Mr. Baiger's Report in December, 1981, the contract consultant was sent in immediately to sit down with Mr. Gray and spend the necessary time on his concern. Lack of good faith cannot be imputed to Mr. Bergie for the failure of the consultant, even after *that* opportunity, to understand Mr. Gray's concern correctly. Mr. Gray again raised the issue with Mr. Bergie directly at the NASCO trial at the end of January, and became upset when Mr. Bergie still failed to "straighten it out" as he promised, but it was no later than March that the full discussion with Mr. May and Mr. Bergie purported to resolve it. It was at that meeting that Mr. Bergie insisted that the regulations must be strictly complied with, and that no one ought ever to be entering a confined tank without it being certified safe, no matter what the difficulty. Mr. Gray states that *he* knew that approach would never work, but that falls a long way short of establishing a lack of sincerity on Mr. Bergie's part, particularly when the remainder of the union complement argued against Mr. Gray at the meeting.

50. The matter of stop-blocks for crane repairs also took a good deal of time and effort to resolve, but once again the direct involvement of Mr. Bergie occurred only in the latter stages. Mr. Gray did complain to Mr. Bergie, once again in the Baiger critique, about the lack of an order on stop-blocks, but Mr. Baiger appears to have felt that he had the situation in hand when he wrote that the company "had agreed" to follow Ministry policy in this regard. It is not difficult to accept that Mr. Baiger similarly satisfied Mr. Bergie in their discussions. When Mr. Gray raised the problem directly, in 1982, Mr. Bergie's reluctance to issue an order in light of the Stelco precedent is not as easily understood, but the Board does not have sufficient evidence of the situation at Stelco to impute bad faith to Mr. Bergie in the explanations he gave.

51. There was, finally, the Terry Ryan accident. Without doing an injustice to Mr. Gray's extensive report, any cause and effect between general work practices at the company and the specific accident to Mr. Ryan remained a matter of conjecture, and there is nothing in the report that demonstrates that Mr. Bergie's initial conclusions, based on the information that Mr. Gray was able to provide, was unreasonable. Mr. Bergie on the evidence played no role whatever in the negotiation of a limited guilty plea after several days of the company's trial, and not a whisper of bad faith can be imputed to him on that score. This finding ought not to come as any revelation to the complainant, who himself testified that he felt the entire Ryan matter was not in the hands of Mr. Bergie, but being "quarterbacked from above".

52. Then there was Mr. Gray himself. Mr. Gray's concerns were too well researched, too well documented, and, on the basis of the limited sampling of concerns highlighted in these proceedings, too well vindicated to dismiss Mr. Gray as an over-reacting idealogue, and once again, respondent's counsel has not attempted to do so. But there is also little doubt that Mr. Gray would be a problem for anyone genuinely trying to mediate, or "facilitate", the health and safety situation in the Transformer Division of Westinghouse. In his lengthy appearance before the Board, Mr. Gray demonstrated an uncompromising cynicism and tenacity, as well, as the record indicates, as an abundant willingness to politicize and "media"-tize his concerns. It may well be that all of this can be fully justified by Mr. Gray's experience at Westinghouse: other methods were tried and failed, and the reasons for Mr. Gray's frustration are apparent. But one has to reflect, nonetheless, on the concern expressed in the Burkett Report about the manner in which denigrating and politicizing can feed upon themselves, and produce an ever-increasing disincentive for co-operation. Mr. Bergie himself testified to having said to Mr. Gray, "You get along with nobody; nobody's good enough for you", and having drawn a distinction between "challenging a report" and "not accepting *any*". In one example

recounted by Mr. Gray himself, Mr. Bergie was present when the company indicated that it would have a report shortly from an outside engineer on a cable-snapping incident, and volunteered to sit down and discuss it with the joint committee as soon as it was received. Mr. Bergie was obviously pleased, and commented to the company that that was “more like it” and “a good start”. Mr. Gray’s reply was that that was fine, but that it would be his intention to take the report outside to other consultants in any event, once the committee had had a look at it. The company thereafter declined to follow up its offer. It may well be that Mr. Gray was intending by his remark only to be “up-front” with the company, but this continuing state of cynicism, before even seeing the report, must have been disheartening to Mr. Bergie.

53. Whatever the causes, it is clear that the “internal responsibility system” at Westinghouse’s Transformer Division was not working well. With all of the “unresolved concerns” emanating from the committee, standard inspection reports were growing from 10 to 70 pages, and the lengths of the inspections themselves moved from 1 to 10 or 11 days each. Committee meetings themselves were marked by acrimony and confrontation. Mr. Gray felt the company had no real interest in safety, and said so. Al Smith, the company’s Personnel Manager and spokesman on the committee, felt it was impossible to please Mr. Gray, and said so. Each of the three inspectors that Mr. Bergie put into Westinghouse during this period reported to him their concern over the high degree of animosity existing on the committee. The first of these, Mr. Forrester, wrote the following memorandum to Mr. Bergie on the occasion of transferring out of the region:

May 2/80

To: L. J. Bergie – Mgr. Reg. 6

Employer: Westinghouse – Transformer Div.

Address: 1632 Burlington St. E., Hamilton.

Re: Inspection Report dated 08/04/80

This company is in very bad shape re the Internal Responsibility System – if such a system exists at all in this Division.

I would recommend that consultations be held with top management at the high level to aid them in resolution of their problem.

The main problem appears to be the fact that there is a clash of personalities and health and safety is handled in an adversarial level.

The attached file may assist you with some background information:

(1) H & S Committee minutes for Jan., Feb. and Mar/80.

(2) Union H & S representative (Stan Gray) – list of concerns.

Good luck!

We agree with counsel for the complainant that to attribute the problems on the committee to mere “personality clashes” is to trivialize the very real concerns which lay behind those clashes. The comments of each of the inspectors in turn on the “clash of personalities” that they perceived as taking place between Mr. Gray and Mr. Smith do, however, serve to underscore the palpable tension which characterized the joint committee at Westinghouse.

54. Mr. Bergie, as noted, was not, of course, without some of his own opportunities to witness the tension on the committee. At a meeting with the committee at the plant in October of 1980, Mr. Bergie watched Mr. Gray and Mr. Smith “at each other’s throats, trying to score points”, as he said, over the accident to Terry Ryan, and decided that that was an opportune moment to comment on the atmosphere of the committee. He pointed out that the company and the union had adopted an adversary approach to health and safety, and that it was time they “took a look” at themselves. Mr. Gray responded that the problem was with the company, who had the only real power to do anything, and that it was taking advantage of the Ministry’s repeated failure to enforce the Act. Mr. Bergie told Mr. Gray that he felt Mr. Gray employed too much of a hostile manner, and too much rhetoric. He said that the union should keep its requests reasonable, and should drop hazards “from 1911”. To the company he said: “You should look reasonably at concerns that are raised, and accept responsibility; if there is a resolution, it’s your job and ours”. Mr. Bergie also suggested that the company consider bringing in some of their health and safety personnel from Head Office. In particular, Mr. Bergie mentioned Terry Hoak, whom he said he had come to know through his years as an inspector in the Switchgear Division. Mr. Hoak was employed in the Health and Safety Division of Head Office, and, according to Mr. Bergie, had always demonstrated a genuine interest in health and safety, ahead of operational concerns.

55. Mr. Gray was not impressed with Mr. Bergie’s lecture. He testified that he had no regard for the company’s head office, and that it was the head office who had been frustrating the union at every turn. He testified:

It’s a matter of concrete hazards, not whether Stan Gray gets along with the company. To ensure safety, if you have to be hostile, so be it. Mr. Bergie’s job was to enforce the Act, not to ensure that the company and the union get along the Act reflects an inherent adversarial relationship.

Mr. Gray in his evidence dismissed Mr. Bergie’s comments to the company as “a one-line nothing statement”, and of the “internal responsibility system” says:

It’s just used by the Ministry as a sham to keep the heat off the company.

In September of 1981, Mr. Bergie, together with Mr. May, did in fact raise with Mr. Bryson, the company’s Vice-President of Manufacturing, the possibility of replacing Mr. Smith on the committee with someone like Mr. Hoak. Mr. Bryson replied that he would think about it, but that Mr. Smith was “the only one who could handle Mr. Gray”.

56. It was, in any event, the joint committee meeting of February 25, 1982, that brought matters to a head. That was the meeting at which Mr. Gray, frustrated by the inaction of the company and the ineffectiveness of the Branch, chastised both for his unaddressed list of concerns, and accused them of acting in bad faith. Like Mr. Krouse, Mr. May has been ill and did not testify. However, we accept Mr. Bergie's evidence that it was Mr. May, after Mr. Gordon had been so upset by what he read in the February 25th Minutes, who directed Mr. Bergie to go into the plant on March 17 and 19 and "tell them what the internal responsibility system was all about". Mr. May's own memorandum to the Director, Mr. Melnyshyn, a short time after that read:

The Joint Health and Safety Committee in this plant is being rendered ineffective by the constant bickering and the failure to resolve problems.

In light of all of this, Mr. Bergie went into the plant and, in the course of the heated discussion which ensued, and on the basis of tactics which he had successfully employed elsewhere, threatened to petition the Minister to permanently remove the incumbents from the joint committee, "unless they could come up with something else". This was not a threat which Mr. Bergie had the slightest intention of trying to carry through. But given the seriousness of the threat, the position of institutional power from which it came, and the potential chilling effect which such a threat could thus have on the legitimate exercise of rights under the statutes, this is not a tactic, no matter how well-meant, which the panel would wish to endorse.

57. But it is in fact only the matter of intention which is at issue here. On all of the evidence, has the Board been satisfied that the statement really was, as the complainant submits, intended to intimidate Mr. Gray and his colleagues from pursuing their lawful rights under the *Occupational Health and Safety Act* and section 3 of the *Labour Relations Act*, for the purpose of leaving Westinghouse Canada with a freer hand to do as it pleased? Or was it one final attempt by Mr. Bergie to generate some form of change in the adversarial relationship he saw dominating the joint committee, in an effort to better effectuate the policies of the *Occupational Health and Safety Act* as he saw them. For all of the reasons given above, we find it to be the latter.

58. We view in the same vein the statements by Mr. Bergie with respect to taking to the NDP information disclosed by the company to the joint committee. Section 34(1), which Mr. Bergie indicates was in the back of his mind, reads:

34.-(1) Except for the purposes of this Act and the regulations or as required by law,

(a) an inspector, a person accompanying an inspector or a person who, at the request of an inspector, makes an examination, test or inquiry, shall not publish, disclose or communicate to any person any information, material, statement, report or result of any examination, test or inquiry acquired, furnished, obtained, made or received under the powers conferred under this Act or the regulations;

(b) no person shall publish, disclose or communicate to any person any

secret manufacturing process or trade secret acquired, furnished, obtained, made or received under the provisions of this Act or the regulations;

- (c) no person to whom information is communicated under this Act and the regulations shall divulge the name of the informant to any person; and
- (d) no person shall disclose any information obtained in any medical examination, test or x-ray of a worker made or taken under this Act except in a form calculated to prevent the information from being identified with a particular person or case.

Whether or not that language in fact goes far enough to prohibit the precise conduct referred to, it must be borne in mind that it was information provided to the committee by the *company* that Mr. Bergie was speaking of, and that Mr. Gray was continually after Mr. Bergie and his staff to cause the company, as section 8 of the Act anticipates, to make more prompt and complete disclosure of such information. Recalling, as an example, the concerns of the Bur-kett Commission noted earlier in the decision, the Board does not find it difficult to accept that Mr. Bergie would have been concerned about the impact which the "political" use of such information would have on the continuing efforts to obtain disclosure, and to convince the company of the benefits of joint consultation under the Act. Once again, therefore, the evidence fails to satisfy us that Mr. Bergie, whether right or wrong in his interpretation of the *Occupational Health and Safety Act*, was intending to act other than in furtherance of the policies and objectives of that Act.

59. The complaint is accordingly dismissed.

ADDENDUM OF BOARD MEMBER S. COOKE;

1. The failure of the complainant to meet the narrow test required for his complaint to succeed under section 89 of the *Labour Relations Act* must in no way be interpreted as an endorsement of the actions of Westinghouse or the Safety and Health Division of the Ministry of Labour.

2. The evidence before us in the form of exhibits, i.e., the reports of inspectors in the Hamilton Office of the Industrial Health and Safety Branch describe a litany of orders resulting from inspectors' findings of Westinghouse's failure to comply with one safety matter after another and describing continuing safety and health concerns of the complainant and other Joint Safety and Health committee members of the United Electrical, Radio & Machine Workers of America Local 504.

3. The Inspection Branch of necessity depends on the Internal Responsibility System to persuasively bring compliance with the *Occupational Health and Safety Act* and Regulations. This is necessary in view of the massive task of providing for worker safety in the many industrial establishments in Ontario. However, in a situation of this kind, where the employer exhibits a great deal less than enthusiastic support for the process being relied upon and where acrimony, rather than cooperation, is exhibited at the meetings of the Joint Safety and Health

Committee, it is incumbent on the Safety and Health Branch to do more to enforce the legislation than re-issue orders and decry the failure of the Internal Responsibility System.

4. The standards of safety and health envisioned by the legislators can only be achieved with diligent application of all of the tools at the disposal of the Safety and Health Division. That includes vigorous attempts at compliance by use of the Internal Responsibility System and the issuance of orders and vigorous prosecution where the first two avenues fail.

0745-83-U; 0991-83-U Carleton Roman Catholic Separate School Board Employees' Association, Complainant, v. **Carleton Roman Catholic Separate School Board**, Respondent

Change in Working Conditions – Discharge for Union Activity – Unfair Labour Practice – Discharges occurring prior to employee decision to organize – No anti-union motive – Firm decision to alter method of pay made and communicated prior to freeze period – No violation

BEFORE: Ian C. Springate, Vice-Chairman, and Board Members

J. Wilson and F. S. Cooke.

APPEARANCES: *Philip W. Augustine, Carol Rutledge, Marcel Laframboise and Gilles Lacasse for the complainant; John Read, Steve Richardson, Phil Roussy and Don Pajot for the respondent.*

DECISION OF THE BOARD; February 22, 1984

1. These proceedings arise out of two related complaints to the Board under section 89 of the *Labour Relations Act*. The complaints allege that the respondent school board violated sections 64, 66, 70 and 79(2) of the Act.

2. The complaints break down into two general categories. One relates to the allegation that the respondent violated sections 64, 66 and 70 of the Act. As will be set out in more detail later, these sections prohibit an employer from interfering in the formation, selection or administration of a trade union, discriminating against trade union members, or seeking by intimidation or coercion to compel any employee from becoming or continuing to be a member of a trade union. The second aspect of the case relates to section 79(2) of the Act. This section provides that once an employer has received notice that a trade union has applied to be certified to represent its employees, existing conditions of employment as well as any rights, privileges or duties of both the affected employer and employees are "frozen" until the certification application has been disposed of.

3. Prior to the formation of the complainant Association, most of the school board's non-teaching staff dealt with the school board through an informal staff-liason committee. The school board, however, formally bargained with two teacher organizations, namely, the Ontario English Catholic Teachers Association and the L'association des enseignants franco-ontariens,

as well as with the Canadian Union of Public Employees with respect to its school secretaries. In November of 1982, a number of bus drivers in the employ of the school board raised certain complaints concerning their working conditions, including an allegation that one of their supervisors had been threatening and insulting employees. It was also contended that two drivers had been discharged without just cause. In December of 1982 members of the staff-liason committee began to discuss the desirability of forming an organization which could be certified under the *Labour Relations Act* to represent non-teaching staff, including drivers, janitors and office and clerical staff. At least one of the motivating factors behind this move appears to have been the unresolved complaints of the bus drivers. On or about February 23, 1983 a meeting was held to take the first steps towards forming the complainant Association. A second meeting of employees was held on or about March 26, 1983 at which the formation of the Association was completed.

4. During the period when the formation of the Association was still in the discussion stage, the school board began consideration of its 1983 budget. On November 30, 1982 Mr. F. N. Roussy, the school board's superintendent of finance and administration, set out a proposed time schedule for preparing and receiving final approval for the budget. Mr. Roussy's staff prepared a first budgetary estimate on January 31, 1983. This estimate, with certain alterations, was presented to the trustees of the school board on February 15, 1983. The revenue side of the estimate was based upon both a projected increase in grants from the provincial government as well as a nine per cent increase in the local tax rate. One of the major costs of operation on the projected expenditure side related to transportation costs. As at February 15, 1983, the estimated transportation costs stood at \$6,021,638.

5. Approximately 13,000 students are transported daily to the various schools operated by the respondent school board. Approximately eighty per cent of these students are transported by private transportation firms operating under contract with the school board. The remaining twenty per cent are transported on buses owned and operated by the school board. The school board employs both full and part-time drivers for this purpose, although in recent years whenever a full-time driver has left the school board's employ, he or she has been replaced by a part-time driver. In the 1982-83 school year the school board employed eleven full-time and forty-two part-time drivers. Most of the part-time drivers were paid for six hours per day eleven months per year. All of the full-time drivers were paid for eight hours per day twelve months per year. In 1981 the school board had considered reducing the complement of full-time drivers to six, but had decided against it.

6. In 1982 the school board spent a total of \$5,201,252 in transportation costs. In calculating its 1982 grants to the school board, the provincial government had allocated \$4,760,320 for transportation expenses. Accordingly, \$440,932 of the 1982 transportation costs had to be made up from local tax revenues. As already indicated the preliminary estimates for 1983 indicated a transportation cost of \$6,021,638. It was anticipated that the provincial government would cover \$5,407,939 of this expense, leaving a shortfall of \$613,699, which was close to \$173,000 more than the equivalent amount in 1982. This initial projection caused Mr. Roussy to look for some means of reducing transportation costs.

7. At Mr. Roussy's direction, the staff of the school board used daily logs kept by the drivers to prepare a schedule of the times actually spent by the drivers transporting children on their buses. The resulting schedule did not include either driving time to and from pick-up and drop-off points or the time required for other duties such as safety checks on the buses.

The schedule indicated that although the drivers were getting paid for either six or eight hours of work per day, many were actually transporting children for less than three hours per day, with the maximum time being just under four hours. In light of these results, Mr. Roussy concluded that substantial sums could be saved by paying drivers for the hours that they actually worked.

8. On April 21, 1983 the provincial government advised the school board as to the amount of grants it would be receiving. Although the amount with respect to transportation costs was about as projected, the overall amount was considerably less than the board had budgeted for. In response, the finance committee of the school board decided to raise the increase in local taxes by eleven per cent instead of the planned nine per cent. This, however, still left the school board with a projected deficit of some 1.9 million dollars. Accordingly, the finance committee of the school board directed that the preliminary expenditure estimates be revised to achieve a reduction of this amount.

9. On April 28, 1983 Mr. Roussy forwarded to the school board's Director of Education a summary of various proposed reductions. These reductions were spread throughout the budget, with the largest item being a reduction in excess of one million dollars in the "education sectors" which takes in items such as desks, books and school supplies. One of the proposed reductions involved a cut of some \$216,650 from the transportation department budget, a cut which would leave the amount of transportation costs not covered by the provincial government transportation grant at about the same level as the previous year. Part of the projected savings in the transportation department was based on the premise of only paying the drivers for the hours that they actually worked. Since this change was only slated to commence at the start of the 1983-84 school year, the resulting cost savings would not be fully recognized until the 1984 fiscal year. A note to the April 28, 1983 document described the proposed changes as follows:

"Reduction of full-time drivers i.e. 12 months - 8 hours per day to maximum 5 hours per day, 10 months per year effective September 1, 1983. Part-time drivers to be also on a 10-month year from the current 11 months with a maximum of 5 hours per day from 6 hours per day. (Estimated annual saving \$100,000)."

10. At a May 3, 1983 meeting of the school board trustees, the chairman of the board's finance committee presented a budget proposal which included the cuts proposed by Mr. Roussy. The cuts involved some reduction in janitorial services. In their discussion of the budget proposals, the trustees voted to add \$150,000 to the amount budgeted for janitorial services, with the extra money to come from increased tax revenues. The evidence indicates that this addition arose out of a concern among certain of the trustees that without it the janitorial services in the schools might suffer. Janitorial staff are included among the members of the complainant Association. The proposed budget, with the additional \$150,000 for janitorial services, was adopted by the trustees with no further changes.

11. On May 3, 1983, the same day that the budget was adopted by the school board, the Association filed an application for certification with this Board. The school board received formal notice of the application from the Board on May 5, 1983. Because of certain difficulties with its membership evidence, the Association decided to withdraw its application

and have employees sign new membership documents. The application was withdrawn on or about May 13, 1983.

12. On May 16, 1983 Mr. Roussy and certain of his staff met with the bus drivers. At this meeting Mr. Roussy announced that as of September 1, 1983 all drivers would be paid on a ten month a year, five hours per day basis. This five hours was based on the assumption that drivers' runs in the morning and afternoon would take one and one half hours and the noon runs two hours. Mr. Roussy indicated that he would subsequently put these changes in writing.

13. On June 7, 1983 the Association filed a second application for certification. On the same day a meeting was held of the school board trustees. At the meeting, Mr. Roussy advised the trustees as to the reaction of the drivers to the announcement of the changes affecting them, and also discussed with them the manner in which the changes were to be implemented. There then followed a discussion among the trustees as to whether the matter need be voted upon again, with the consensus being that it should be. A vote was then held in which the trustees by a nine to five margin approved the following resolution with respect to the changes:

"That the staff reorganization be approved as presented verbally at the committee of the whole meeting of June 7, 1983."

14. On June 8, 1983, Mr. Roussy forwarded a memorandum to the bus drivers. The most relevant parts of the memorandum stated as follows:

"This memorandum summarizes the verbal presentation made by the undersigned at a special meeting of bus drivers held at St. Bernard School on Monday, May 16th, 1983.

It was announced at the above-mentioned meeting that the Board, through the adoption of its 1983 Budget, had approved a major reorganization of school bus drivers' hours to take effect September 1st, 1983 for the school term 1983-84.

The changes adopted by the Board were as follows:

(A) All bus drivers to be on a 10-month year, September 1st to June 30th.

(B) Maximum number of daily hours is five (5) hours with the exception of routes which may require additional time

- hours of pay will be calculated on the following basis:

a.m. bus run	1.5 hrs
p.m. bus run	1.5 hrs
noon hour run	2 hrs
	5 hrs

- the daily inspection of vehicles required by the Department of Transport is included in the above five (5) hours daily;

- drivers with no noon hour run shall be paid three (3) hours daily;

- drivers will be paid to take buses in for maintenance as required by local supervisors.

• • • •

In conclusion and as was mentioned at the meeting, it is my intention to meet the drivers in each area during the week of June 20th, 1983 to discuss fully the implementation of the above as well as other topics which may be of general interest. A schedule of these meetings will be sent out as soon as it is finalized. Should additional information be required, you are invited to contact Mr. LeBlanc, Manager of Transportation & Assessment."

15. The school board received notice of the Association's second application for certification on June 10, 1983.

16. At a meeting of trustees held on June 21, 1983, a motion was made that the changes affecting the bus drivers be reconsidered as having been adopted without sufficient review. Seven trustees supported the motion while six opposed it. Because of a rule that any motion to reconsider a previous motion must have the support of two-thirds of the trustees, the reconsideration motion did not succeed, and accordingly, the matter was not re-opened.

17. On July 7, 1983 Mr. Roussy met with the drivers to again review the proposed changes. At the end of the meeting, Mr. Roussy advised the full-time drivers that if they so desired, they could work an additional three hours per day doing janitorial work. Together with five hours pay for their driving, any drivers selecting this option would continue to be paid for eight hours per day. Only a relatively small number of drivers opted to perform janitorial work. Some of the drivers apparently felt they were not suited for this type of work, while others concluded that it would result in an overly long workday. Mr. M. Laframboise, one of the drivers who did decide to perform janitorial work, testified that as of September 1983, he has been starting work at 6:45 a.m., returning home about 4.45 p.m., and then in the evening driving sixteen miles to work for three additional hours as a janitor.

18. Although Mr. Roussy's June 8, 1983 memorandum indicated that drivers who were required to work more than five hours per day would be paid for the additional time, the school board has been paying all drivers on the basis of five hours per day. This is based on the assumption that the drivers can complete their work within five hours of actual working time. However, in these proceedings, one of the drivers, Mr. Laframboise, testified that because his route is very spread out, he spends in excess of six hours per day in connection with his driving, although he is only paid for five hours. It appears that during the period covered by the logs used to prepare the schedule of driving times, Mr. Laframboise had not been driving this particular route.

19. As noted earlier, one aspect of the Association's complaint is based on the allegation that the school board violated sections 64, 66 and 70 of the Act. These sections provide as follows:

"64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence."

"66. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

(a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;

(b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or

(c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act."

"70. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act."

20. In support of its contention that the above provisions had been violated, the Association relies in part on the manner in which the school board dealt with its drivers in November of 1982, as well as what it characterizes as the summary discharge of two of the drivers. A difficulty with this contention, however, is that the events being complained of occurred prior to any steps being taken to form the Association. Indeed, it was the conduct in question which in part triggered the formation of the Association. Accordingly, it cannot be the case that the school board's conduct was based on anti-union considerations. The Association also relies on the change in the manner of paying the drivers, contending that it was

motivated by anti-union considerations and was intended to disrupt the Association. The evidence taken as a whole, however, does not support this contention. It is noteworthy in this regard, that the trustees voted additional sums for janitorial services, even though the janitorial staff belong to the Association. Taking all of the evidence into account, it appears that the school board's motivation was one of seeking to cut expenses as a result of lower than anticipated provincial government grants, rather than a desire to interfere with the Association's formation, or its desire to represent employees. However one might view the wisdom of the school board's actions, we are satisfied they were not motivated by anti-union concerns and that they did not violate sections 64, 66 or 70 of the Act.

21. The second aspect of the case relates to the "freeze" which comes into force once a trade union has applied for certification. Section 79(2) of the Act provided as follows:

"Where a trade union has applied for certification and notice thereof from the Board has been received by the employer, the employer shall not, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer or the employees until,

(a) the trade union has given notice under section 14, (i.e. notice to bargain after being certified) in which case subsection (1) (i.e. another "freeze") applies; or

(b) the application for certification by the trade union is dismissed or terminated by the Board or withdrawn by the trade union."

22. The parties are at issue on several matters. One relates to the question of whether the changes affecting the bus drivers amounted to the type of alteration of terms or conditions of employment referred to in section 79(2). The parties also disagree on the point in time that any such alteration could be said to have occurred. Finally, the parties disagree as to the time period or periods that a freeze was in effect.

23. The school board contends that its action did not involve the alteration of terms or conditions of employment of the drivers. The school board contends that it was merely carrying on "business as before", in that it always had the right to alter the manner in which it paid its drivers. In support of its position, the school board relies on the fact that in addition to dealing with matters affecting employees, section 79(2) also preserves "...any right, privilege or duty of the employer...". The school board contends that this preserved its right to alter the manner of paying the drivers.

24. The purpose of section 79(2) is to maintain the prior pattern of an employment relationship while an application for certification is pending. A similar freeze period provided for in section 79(1) maintains that pattern while the parties are negotiating a collective agreement. These provisions ensure that there will be no unilateral alteration in the *status quo* which may give one party an unfair advantage either from the point of view of propaganda or collective bargaining. To this end, section 79(2) preserves existing terms and conditions of employment while also maintaining existing employer rights and privileges. At first glance, these appear to be somewhat contradictory, since the employer may have had the legal right to change certain conditions of employment. The board has resolved this apparent contradiction

by interpreting section 79 to mean that an employer may continue to operate its business as it has done so in the past. The right of an employer to carry on its business subject only to the stabilizing effect of section 79 was elaborated upon the Board in *Spar Aerospace Products Ltd.* [1978] OLRB Rep. Sept. 859. Although this case primarily dealt with the freeze which comes into force after a union has served notice to bargain, the following comments are equally applicable to the freeze triggered by a certification application:

“23. The ‘business as before’ approach does not mean that an employer cannot continue to manage its operation. What it does mean is simply that an employer must continue to run the operation according to the pattern established before the circumstances giving rise to the freeze have occurred, providing a clearly identifiable point of departure for bargaining and eliminating the chilling effect that a withdrawal of expected benefits would have upon the representation of the employees by a trade union. The right to manage is maintained, qualified only by the condition that the operation be managed as before. Such a condition, in our view, cannot be regarded as unduly onerous in light of the fact that it is management which is the best position to know whether it is in fact carrying out business as before. This is an approach, moreover, that cuts both ways, in some cases preserving an entrenched employer right and in other cases preserving an established employee benefit.

24. The Board recognizes that this approach differs from that taken by our federal counterpart in *Royal Bank of Canada*, *supra*. That Board appears to have interpreted the freeze as prohibiting an unilateral action by the employer during the period of the freeze. Such actions, in that Board’s view would be “incompatible with the exclusive role of a bargaining agent and the collective bargaining regime of the Code”. This reasoning overlooks the fact that a full collective bargaining regime is not created by the mere giving of notice to bargain. Rather, during the period of the freeze, an interim legal regime is imposed by operation of section 70 as the parties move from the regime of the individual contract of employment to one governed by the terms of a collective agreement. This interim legal regime, in our view, should not place an employer in a legal straitjacket yet it should not at the same time lead to employees perceiving themselves as being penalized for engaging in collective bargaining. These two ends, in this Board’s view, are best achieved by interpreting section 79 as requiring the parties to simply conduct ‘business as before’.”

25. Can it be said in this case that the school board was carrying on business as before? We believe not. There was a firm and established practice by which full-time drivers were paid for eight hours per day, twelve months per year, and part-time drivers five hours per day, eleven months per year. There did not exist a practice by which the school board altered its system of paying the drivers based upon changing circumstances or differences in hours actually worked. By changing the system of paying its drivers, the school board was not carrying on business as before, but rather was drastically altering its existing practices. The changes were substantial and in our view involved an alteration to the existing terms or conditions of employment of the drivers.

26. Having regard to our reasoning set out above, we are satisfied that the changes implemented by the school board are the type of alterations governed by section 79(2), and that during a freeze period they could not have been instituted by the school board without the consent of the Association.

27. The next issue concerns the point in time at which the alteration in the conditions of employment of the drivers can be said to have occurred. The school board began its budgetary considerations in November of 1982, while the changes affecting the payment of bus drivers were not actually implemented until September of 1983 at the commencement of the 1983-84 school year. The parties take differing positions as to the point in time during this rather lengthy time span that it can be said that the alteration occurred. The school board points to several possible dates, but contends it was certainly no later than the adoption of the budget by the trustees on May 3, 1983. The Association, however, contends that the earliest possible date was June 21, 1983, the date the trustees last dealt with the matter.

28. The Board has long recognized that the existing pattern of an employment relationship may contain a prospective element. In the *Scarborough Centenary Hospital* case [1969] OLRB Rep. Jan. 1049, the Board concluded that a section 79 freeze preserved not only the wages being paid to employees, but also any additional amounts promised prior to the freeze that were to be implemented during the freeze period. Similarly, in the *Hostess Food Products Ltd.* case [1975] OLRB Rep. Mar. 210, the Board found that an employer contravened section 79(2) by failing to implement a substantial wage increase announced prior to the employer receiving notice of an application for certification. The Board has, however, also concluded that for a freeze period to operate effectively it must be in relation to rights and privileges known to both the employer and employees. Accordingly, the Board has consistently required that a firm decision to change terms and conditions of employment or employee privileges must be actually communicated to the employees prior to the onset of the freeze period if it is not to be caught by the freeze. See *Carleton University* [1978] OLRB Rep. Feb. 184; *Ottawa General Hospital* [1978] OLRB Rep. Oct. 1461 and *Le Patro d'Ottawa* [1983] OLRB Rep. Feb. 244.

29. In the instant case, on May 3, 1983, the trustees of the school board adopted a budget based upon the alterations in paying the drivers, and the alterations were orally communicated to the drivers on May 16, 1983. On June 7, 1983, however, the trustees discussed how the changes were to be implemented as well as staff reaction to the changes. After some discussion about whether another vote need be taken, the trustees voted to approve the re-organization. On June 8th the drivers were provided with written memorandum describing the changes in the method of payment. On June 21, 1983 a motion was made to reconsider the matter, but because the motion lacked the support of two-thirds of the trustees, the matter was not re-opened.

30. On the evidence, we are satisfied that at the June 7, 1983 meeting the trustees of the school board made a firm decision to alter the conditions under which the drivers were paid, and that this decision was communicated to the drivers no later than June 8, 1983 by way of the written memorandum from Mr. Roussy. The fact that it was a firm decision is highlighted by the fact that at the June 21, 1983 meeting, a motion was made to reconsider the change, and because it was a reconsideration motion it failed as lacking the backing of two-thirds of the trustees. Doubtless the two-thirds rule is in place to ensure that decisions already made cannot easily be re-opened. In this case, the decision affecting the drivers was

not re-opened, rather the decision already made was allowed to stand. In these circumstances, we are satisfied that the school board announced a firm plan to change its method of paying the drivers no later than June 8, 1983.

31. The only remaining issue is whether June 8, 1983 was within a time period covered by a section 79(2) freeze. The Association contends that a freeze commenced on May 5, 1983, the date the school board received notice of the initial application for certification, and that it was still in effect at all relevant times. We are unable to agree. A freeze did come into force on May 5, 1983. However, on the basis of the clear language of section 79(2), we must conclude that this freeze came to an end when the application was withdrawn by the Association, that is, on or about May 13, 1983. The second application was filed on June 7, 1983. Section 79(2) provides that a freeze period commences when notice of an application is received by the employer from this Board, which was on June 10, 1983. June 10, 1983 was subsequent to both the adoption of the changes by the school board, and the communication of those changes to the drivers in writing. Accordingly, the changes were not caught by the freeze period which began on June 10, 1983.

32. The legal issues in this case relate solely to the question of whether the changes implemented by the school board were the result of an anti-union animus, or whether they were made during a section 79(2) freeze. The issue is not whether we agree with the school board's decision, or the manner in which it was implemented. Further, although the evidence does indicate that at least one driver is required to perform certain work for which he is not paid, that is not a matter covered by the *Labour Relations Act*, and accordingly, this Board has no statutory authority to rectify the situation. We would note, however, that there are other legal remedies open to the driver in question.

33. In that we are satisfied that the actions of the school board were not in violation of sections 64, 66, 70 or 79(2) of the *Labour Relations Act*, these complaints are hereby dismissed.

2282-83-U Abdul Chafchak, Complainant, v. United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W. and its Local 195, Respondent, v. Central Stampings Limited, Intervener

Duty of Fair Representation – Practice and Procedure – Unfair Labour Practice – Delay in filing not justifying refusal to entertain complaint – Union deciding not to file discharge grievance – Manner of investigating merits of grievance perfunctory – Delay taken into account in remedy – Back pay in event grievance successful apportioned between union and employer

BEFORE: Richard M. Brown, Vice-Chairman.

APPEARANCES: *Rodney Godard, Abdul Chafchak and Eddy Manzocco for the complainant; Edward Murphy, M. F. White and Gerald Logan for the respondent; D. S. Jovanovic and Joe Edmondson for the intervener.*

DECISION OF THE BOARD; February 24, 1984

1. In this complaint, under section 68 of the *Labour Relations Act*, Abdul Chafchak alleged that the United Automobile, Aerospace, and Agricultural Implement Workers of America and its Local 195 (the ‘union’) breached the duty of fair representation by not carrying his discharge grievance to arbitration.

I

2. Chafchak began working at Central Stampings Limited in August, 1977 and was terminated on August 3, 1982, after an absence of ten working days that commenced on July 20th. According to Mr. Chafchak, throughout this period he was afflicted with nausea and dizziness, and he was at times unable to walk. He testified that he telephoned the employer each morning. The employer’s records indicate that Mr. Chafchak called in on most days, but not on July 22nd nor on three successive work days ending on August 3rd. On August 3rd, the employer notified Gerry Logan, the Local 195 chairman at Central Stampings Limited, that Chafchak was being terminated at that time. The demerit slip given to Logan stated the reason for ‘dismissal’ was being ‘absent without advising company giving satisfactory reason’. This wording is remarkably similar to that found in Article 12.03(5) of the collective agreement then in force:

12.03 Seniority rights shall cease for any employee who:

• • •

(5) is absent for three (3) days without advising the Company giving satisfactory reasons;

3. On August 5th, the complainant met with representatives of the employer and union officials. Three medical documents were produced at this meeting. The first, a form issued by the Hotel Dieu Hospital and bearing no signature, states that the complainant was examined and treated in the emergency department on July 21, 1982. (Chafchak testified that he was examined by Dr. Dedumets at the hospital on this date.) The second document, dated July

30th and initialed by Dr. Javanovic, says Mr. Chafchak was “unable to work from July 22 to August 3, 1982 due to severe gastroenteritis”. The other medical note was issued by a specialist, Dr. Baptista, to whom Chafchak was referred by Dr. Jananovic. It bears the date August 4th and indicates the patient was “still acutely ill and under treatment”. Michael White, an international representative of the parent union, testified that, at the August 5th meeting, Chafchak said he saw Dr. Javanovic on July 21st. In the Board’s view, Mr. White’s recollection of who Chafchak claimed to have seen on July 21st is in error. The complainant is not likely to have identified the wrong doctor. And even if he had initially given the wrong name, the error was likely certain to have been revealed by the medical notes which disclosed that the July 21st visit was to the Hotel Dieu Hospital whereas Dr. Javanovic’s note was on a Windsor Industrial Medical Clinic’s form.

4. The employer was unwilling to reinstate Mr. Chafchak without verifying the information provided by him. Joseph Edmondson, who is in charge of personnel matters at Central Stampings, paid a visit on Dr. Javanovic and learned from him that he examined Chafchak on July 27th and July 30th. Dr. Javanovic conceded that his note stating that Chafchak’s illness commenced on July 22nd rested entirely upon what the complainant had told him. Consequently, the employer advised the union on August 12th that the dismissal would not be overturned. Logan filed a grievance the next day.

5. Later in August, Chafchak met with the union screening committee comprised of Logan, Stan Wako who was the president of Local 195, and Michael White, an international representative from the parent union. The committee decided to investigate the medical record. According to Logan, Chafchak was told he was on “firm ground” if the doctors’ notes substantiated his claim that he had been sick throughout his absence from work. Logan then called upon Dr. Javanovic, with a “medical release” from the patient in hand. Javanovic said he had no personal direct knowledge of Chafchak’s condition on the days preceding July 27th. When asked for an opinion on this, he declined to give one.

6. The union officials decided to hold another screening meeting. Upon telephoning the Chafchak residence to invite the grievor to attend, Mr. Logan learned he was hospitalized due to a broken leg. In the complainant’s absence, the screening committee decided the grievance was not sufficiently meritorious to be arbitrated. According to White, he and his colleagues did not believe the evidence established that Chafchak was unfit to work on July 22nd to 26th inclusive. A decision was made to approach the employer on bended knee, pleading for reinstatement without back pay. After Gerry Logan made this overture and failed, he withdrew the grievance. Chafchak was then notified that the grievance had been dropped.

7. What occurred during the approximately fifteen months between the time the complainant was told his grievance had been withdrawn – in the late summer or early fall of 1982 – and the date legal proceedings before this Board were initiated? Yet another screening committee meeting was held at the complainant’s request. As English is not Mr. Chafchak’s first language, he was accompanied by a friend who served as translator. Nothing was resolved. A week or so after this meeting, the complainant requested copies of his medical notes from Mr. Logan. Chafchak consulted a lawyer about personal affairs in September, 1983, but did not seek legal advice about this matter until he retained his present lawyer in early 1984. Jack Proctor, an investigator employed by the law firm representing Mr. Chafchak, asked Gerry

Logan on April 10, 1983 to provide information about the grievance. An envelope of documents was handed over six or seven weeks later. Another month passed before Proctor succeeded in obtaining information from Dr. Javanovic's file. On July 6, 1983, counsel for the complainant wrote to the employer:

I am the solicitor for Mr. Abdul Chafchak who was terminated from his employment with Central Stampings on the 3rd of August, 1982. I understand that this termination was based on Mr. Chafchak's absence from work from the 22nd of July, 1982 to the 3rd of August 1982. I further understand that medical information was provided by Mr. Chafchak indicating that his absence resulted from an illness during this period. As such, the dismissal would appear unjustifiable, and I have instructions to bring action against Central Stampings for wrongful dismissal.

You are being advised of this claim pursuant to the provisions of The Judicature Act.

A letter was also sent to the union by counsel for the complainant on July 6, 1983:

I am the solicitor for Mr. Abdul Chafchak, a member of your Local and a former employee of Central Stampings. Mr. Chafchak was discharged from his employment on the 3rd of August, 1982. The apparent reason for the discharge was the failure to provide a satisfactory reason for not attending work between the 22nd of July, 1982 and the 3rd day of August, 1982. No grievance was filed on behalf of Mr. Chafchak disputing the termination in spite of the fact that a medical report was provided to the Union representative indicating Mr. Chafchak had been unable to work through illness for this period.

The time limits set out in the collective agreement between Central Stampings and the UAW Local 195 have long since expired. It may well be that Mr. Chafchak, because of the collective agreement, is without remedy against Central Stampings for this wrongful termination. I fail to see why Local 195 did not grieve this dismissal on behalf of Mr. Chafchak.

Please advise me if the Local is in a position to undertake a grievance of this dismissal on behalf of Mr. Chafchak.

The complaint was filed on January 5, 1984.

II

8. When the hearing began, counsel for Central Stampings submitted that the Board should not entertain this complaint because of Mr. Chafchak's delay in initiating proceedings. However, counsel was not opposed to the Board hearing the evidence on this issue together with that relating to merits of the complaint. In argument, counsel for the union also contended the complaint was barred by the lapse of time.

9. The Board's approach to complaints not filed in a timely fashion was summarized in *Corporation of the City of Mississauga*, [1982] OLRB Rep. Mar. 420:

21. In recognition of the fact that it is dealing with statutory rights, the Board has not, heretofore, adopted and rigid practice with respect to the matter of delay – holding, in most cases, that it will simply take this matter into account in determining the remedy if a statutory violation is established. However, whatever the merits of this approach, the Board must also keep in mind the potentially corrosive effect which litigation can have upon the parties' current collective bargaining relationship – quite apart from the outcome. Adversarial relationships are pervasive enough in our industrial relations system without the resurrection of ghosts from the past. In the Board's view, the orderly conduct of an on-going collective bargaining relationship and the necessity of according a respondent a fair hearing both require that unions, employers and employees recognize a principle of repose with respect to claims that have not been asserted in a timely fashion. If such claims are not launched within a reasonable time, the Board may exercise its discretion pursuant to section 89 and decline to entertain them.

22. A perusal of the Board cases reveals that there has not been a mechanical response to the problems arising from delay. In each case, the Board has considered such factors as: The length of the delay and the reasons for it; when the complainant first became aware of the alleged statutory violation; the nature of the remedy claimed and whether it involves retrospective financial liability or could impact upon the pattern of relationships which had developed since the alleged contravention; and whether the claim is of such nature that fading recollection, the unavailability of witnesses, the deterioration of evidence, or the disposal of records, some latitude must be given to parties who are unaware of their statutory rights or, who, through inexperience take sometime to properly focus their concerns and file a complaint. But there must be some limit, and in my view unless the circumstances and exceptional or there are overriding public policy considerations, that limit should be measured in months rather than years.

There are several cases in which the Board has entertained a complaint but ruled that any remedy ought to be adjusted to take account of undue delay. See *Hayes Dana Limited*, [1968] OLRB Rep. Apr. 89; *Chrysler Canada Ltd.*, [1979] OLRB Rep. July 618; *Concrete Construction Supplies*, [1979] OLRB Rep. Aug. 739; *Irving Posluns Sportswear*, [1979] OLRB Rep. Oct. 986; *Ontario Paper Company Limited*, [1980] OLRB Rep. Jan 76; *Chrysler Canada Ltd.*, [1980] OLRB Rep. May 650; *Labourers' International Union of North America*, [1980] OLRB Rep. May 733; *Caravelle Foods*, [1983] OLRB Rep. June 875. For cases in which a complaint was barred by delay, see *CCH Canadian Limited*, [1977] OLRB Rep. June 351; *Sheller Globe of Canada Ltd.*, [1982] OLRB Rep. Jan. 113; *Concrete Construction Supplies.*, [1982] OLRB Rep. Oct. 1446; *Chrysler Canada Limited*, [1983] OLRB Apr. 490; and *Conestoga College of Applied Arts and Technology* [1983] OLRB Rep. June 882.

10. In the circumstances of this case, the time that passed before this complaint was

filed is not sufficient to justify a refusal to entertain it, even though the complainant should have acted with greater dispatch. In my view, the passage of time has not seriously impaired either the ability of the union to defend itself against this complaint or the employer's ability to answer a grievance. Both of these parties were put on notice, some six to nine months after the cause of action crystallized, of the possibility of legal proceedings relating to the discharge grievance. The law firm representing Mr. Chafchak communicated with Gerry Logan several times in the spring and early summer of 1983. Although the letter sent to the union on July 6th made no mention of a section 68 complaint, its text would have alerted a reasonably astute union official of the not insignificant risk that such a complaint would be filed, as this is the only meaningful avenue of legal recourse open to an aggrieved employee. The July 6th letter to the employer stated an intention to initiate a wrongful dismissal action. Consequently, both Logan and Central Stampings were on notice that they might be called upon to defend their actions. As the delay was not excessive, Mr. Chafchak's claim to the protection afforded by section 68 outweighs any "corrosive effect" that the adjudication of this complaint might have on the collective bargaining relationship. But the complainant's failure to act with greater dispatch cannot be ignored if the complaint succeeds on the merits and the Board is called upon to fashion a remedy.

III

11. I turn now to the merits of the complaint under section 68. The grievance and arbitration process is an essential component of a regime of collective bargaining. An employee who is fired, refused a promotion or otherwise dealt with by management in contravention of a collective agreement relies upon this legal mechanism for redress. Section 44(1) of the *Labour Relations Act* requires that every collective agreement provide for the arbitration of all contract disputes – or for their resolution by some other peaceful means. But direct access to an arbitrator is not statutorily guaranteed to an individual employee. Instead, the legislature has granted a trade union, the exclusive bargaining agent for all employees, the right to compel the employer to submit a grievance to arbitration. The union's exclusive authority is counterbalanced by its duty to fairly represent each employee. The duty of fair representation is found in section 68 of the Act:

68. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

12. The double barrelled prohibition against discrimination and bad faith is calculated to prevent differential treatment on the basis of such criteria as race, creed, colour, sex and to preclude invidious conduct motivated by trade union politics, personal animosity and favouritism. See *Prinesdomu*, [1975] OLRB Rep. May 444 at para. 24; [1975] 2 Can. LRBR 310, at 315. This aspect of the duty of fair representation is important, but once the pertinent facts are proven, cases of this variety are easily decided. Giving meaning to the word arbitrary is a far more vexing task that must begin with an appreciation of the role played by union officials in contract administration.

13. In representing grievors, the officials of a union are called upon to perform two

very different sorts of tasks; they investigate employee claims and act as advocates in the grievance process; and they also decide what grievances are to be abandoned, settled, carried to the next stage in the grievance process, or arbitrated. A fair representation complainant typically alleges that an official who acted as investigator or advocate did not exercise proper care or that a decision as to the disposition of a grievance was inappropriate. Although both counts are not infrequently combined in a single complaint, these distinct lines of attack throw up issues of labour law policy that are as different as the two categories of functions carried out by union officials.

14. A disgruntled grievor may challenge only the propriety of the union's decision not to pursue a grievance, and not dispute the union's investigation or advocacy. In this setting, labour relations boards have started from the basic premise that the pursuit of a grievor's claim may adversely affect other employees, and that a bargaining agent is best suited to choose between the competing interests of its constituents. The weight of a grievor's claim is determined by such factors as the job interest at stake, the probability the grievance could be won at arbitration, and the union's past practice concerning similar grievances. Against this claim, a union must weigh not only any conflicting job interests of other employees but also the collective interest in conserving group funds and in not impairing the settlement process by pressing undeserving grievances. So long as the balance struck between these conflicting individual and collective concerns falls within the realm of reason, a labour relations board ought not to interfere, because weighing competing interests is essentially a political task not readily amenable to legal regulation. A fuller discussion of this branch of the duty of fair representation is set out in *Ford Motor Company of Canada*, [1973] OLRB Rep. Oct 519; *Prinesdomu*, *supra*; *Barber Coleman of Canada Ltd.*, [1976] OLRB Rep. Oct 13; and *Rayonier Canada (B.C.) Ltd.*, [1975] 2 Can LRBR 196 (B.C.). For a recent summary see *North York General Hospital*, [1984] OLRB Rep. Feb. 287.

15. The crux of this complaint is not the way the union balanced countervailing interests, but rather the manner in which it investigated the merit of Mr. Chafchak's grievance. This type of fair representation complaint was also discussed in *North York General Hospital*, *supra*:

23. To this point, the focus has been on a disappointed grievor who contends a union wrongly decided his or her contract claim was outweighed by countervailing group concerns. What about a complaint that a union official failed to exercise proper care when investigating or advocating a grievance? A variety of mistakes may occur in the context of contract administration. Overlooking an important fact, or misinterpreting a contract clause, may distort an assessment on the merit of a grievance. Errors may be committed in the course of presenting a case to either management or an arbitrator. A common failing is to file a grievance after a contractual time limit has passed. An employee who complains of any of these faults does not contest a union's authority to balance individual and collective interests. In this setting, the union has made no such determination and, indeed, may wish to pursue the complainant's grievance, but be barred by a misguided settlement of expired limitation period. Even an attack upon a union's decision to drop a grievance, that is

wrongly believed to have little chance of being won, is directed at a mistake of fact or interpretation, not at the weight assigned to competing concerns.

24. How has the prohibition against arbitrary conduct been applied in this context. In *Prinesdomu, supra*, at para. 26, the Board equated arbitrary with “perfunctory” and distinguished arbitrariness from “mere errors in judgement, mistakes, negligence and unbecoming laxness”.

25. There are good reasons for holding a bargaining agent responsible for perfunctory conduct by its officials. Most important, the exclusive authority of a union precludes an employee from completing many of the tasks involved in processing a grievance. An individual cannot insist that his view of either the facts or the meaning of the collective agreement be accepted by a union official who is empowered to decide what grievances are to be arbitrated. The decision to arbitrate is not the only aspect of contract administration which exclusivity removes from an employee’s grasp. The limitation periods contained in many collective agreements can be satisfied only by a grievance filed with the authority of a bargaining agent, so that an individual cannot stop the running of time by initiating a claim. Deprived of the power to safeguard their own interests, employees should be protected against abuses of a union’s authority. Trade union liability can be grounded upon another base. Union officials are held out, by a bargaining agent, to be versed, to a greater or lesser degree, in contract administration, so that employees rely upon them to handle grievances properly. An individual who is vaguely cognizant of a time limit may not bother with it because a union official undertakes either expressly or implicitly, by taking control of a grievance, to attend to the matter. This type of reliance is reasonable and should be protected. Moreover, the services offered by a trade union are not gratuitous, as almost all employees pay for this assistance through union dues. The law helps a union to collect membership fees by enforcing union security clauses and by requiring an employer to agree to insert an agency shop clause in a collective agreement. The payment made by an employee for the assistance of a union, especially forced payment, also justifies holding a bargaining agent liable for mistakes which ought to have been avoided. For all of those reasons, a loss arising out of perfunctory conduct should be lifted from the shoulders of an individual and shared among all union members.

26. The perfunctory standard must be elaborated with sensitivity both to the character of particular union officials and to the nature of the chores they perform. In *Ford Motor Company of Canada, supra*, at para. 40, a distinction was drawn between full-time officials with extensive experience in grievance processing and employee volunteers who help out with contract administration in their spare time. As a general rule, the behaviour of a union representative should be judged by reference to the conduct of a reasonable person with a similar background. Any other approach would drastically curtail the freedom of union members – to

decide not only who they wish to represent them but also how much money they want to contribute to contract administration – by permitting a labour relations board to second guess their determination. So long as all employees in the same circumstances receive equal representation, there is little danger that leaving the choice of representatives in the hands of the collective will lead to the derogation of individual rights.

27. The tasks carried out in the course of contract administration are as disparate as union officials. In some contexts, the appropriate course of action is manifest. As a grievance ought to be processed in conformity with time limits, a failure to do so is obviously an error, and, violates section 68 if attributable to a lack of proper care. But the correct course to follow is not always so clear. Assessing the probability that a contract claim would be allowed by an arbitrator is an undertaking that readily lends itself to differences of opinion, due to the vagaries of interpreting contract clauses and of proving facts. For this reason, a labour relations board should not lightly conclude that a bargaining agent's assessment of the merit of a grievance is wrong, let alone caused by perfunctory behaviour. See *DeHavilland Aircraft of Canada Ltd.*, [1979] OLRB Rep. Oct. 933, at para. 17.

16. Was the conduct of the union officials who handled Mr. Chafchak's grievance perfunctory? Remember the complainant was discharged on August 3rd, after being absent from work on ten days commencing on July 20th, and he presented three doctors notes indicating that he received medical treatment on Wednesday, July 21st, Friday, July 30th and Wednesday, August 4th. Before a decision was made to withdraw the grievance, representatives of the union were aware that he had also been examined by a doctor on Tuesday, July 27th. Upon talking to Dr. Javanovic, Logan had been told that Chafchak was ill on July 27th and 30th when seen by this doctor. Logan also learned that Dr. Javanovic had no direct knowledge of the complainant's medical condition prior to July 27th and could offer no opinion on this subject. Against this background, the union officials decided that Chafchak could not substantiate his claim that he was sick throughout his absence. No effort was made to identify the doctor who had examined him on July 21st, at the Hotel Dieu Hospital or to contact the specialist who saw the complainant on August 4th. But the most troublesome aspect of this case is the failure of union officials to tell Mr. Chafchak that the medical evidence provided by him was not, in their opinion, adequate to support his grievance. At the first screening committee meeting, he was told that he was on "firm ground" if the medical notes were sound. The next communication he received from the union was the message that his grievance had been withdrawn. By failing to consult the complainant before taking this step, the union denied him an opportunity to provide additional medical evidence from the two doctors he was known by the union to have seen on July 21st and August 4th. Given the evidence already before the union and the significance of a discharge grievance, this conduct was nothing short of perfunctory.

17. The appropriate relief is to send the grievance to arbitration. The Board must consider how financial liability for back pay is to be apportioned if Mr. Chafchak succeeds before an arbitrator. In that event, the union's violation of section 68 would have increased the duration of the period of unemployment for which back pay is owing. The employer ought not to bear the financial liability for the loss attributable to the union's misconduct. Therefore, if the grievance succeeds, the employer's liability should be restricted to the period after the date

of this decision. This liability is roughly equivalent to that to which the employer would have been exposed had the union voluntarily carried the grievance to arbitration in the first place. Any loss arising between the dismissal and the date of this decision ought to be shared between the complainant and the respondent. He bears some responsibility for this loss because of his delay. But union officials are also partly responsible for his plight, because they violated section 68 and even an aggrieved employee who launches a complaint with reasonable speed would not obtain redress from the Board until a substantial amount of time had elapsed from the abandonment of the grievance. Recognizing that any estimation lacks precision, I would fix this period at four months. The union is responsible for losses incurred in this period. As the total period for which liability is to be shared between the union and the complainant is approximately twenty months, the union ought to hold liable for 4/20ths of the total loss over this time span. The residual loss should rest with the complainant. This contingent order concerning damages subjects the union to conflicting interests at arbitration – if the grievance is won the union will be exposed to financial liability. In response to this conflict of interests, we direct the respondent to retain counsel jointly chosen by the union and Mr. Chafchak. This direction is analogous to one made in *Leonard Murphy*, [1977] OLRB Rep. Mar. 146. Such an order is also in keeping with the practice of other labour relations boards. See *Adams*, [1976] 1 Can. LRBR 192 (B.C.); and *Massicotte*, [1980] 1 CLRBR 427 (Can) upheld sub. nom. *Teamsters v. Massicotte*, [1982] 1 S.C.R. 720.

18. The Board directs that:

(a) the respondent forthwith submit Mr. Chafchak's grievance to arbitration for a hearing on its merits;

(b) the intervener forthwith take any steps necessary to bring the grievance to arbitration and waive any preliminary objections to a hearing on the merits;

(c) in the event the grievance is upheld and a board of arbitration makes an order for compensation, the respondent pay one-fifth of the amount owing for the period between August 3, 1982 and the date hereof and the complainant be denied compensation for the rest of the loss incurred during this period.

A posting of a notice to employees is not directed because counsel for the complainant did not request a posting and the facts at hand are not such as to prompt the Board to direct a posting on its own motion.

2053-83-U Service Employees International Union, Local 183, Complainant, v. Daynes Health Care Limited, Earl Daynes, Respondents, v. Group of Employees, Interveners

Adjournment – Practice and Procedure – Employees whose employment subject of complaint having only seven days notice of hearing – Adjournment granted on basis of inadequate time for counsel to prepare – No case to date establishing Board authority to order costs or make costs condition of adjournment – Request for costs denied

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members J. A. Ronson and F. S. Cooke.

***APPEARANCES:** Michael Mitchell, Steven Barrett, J. Burshaw II and Caroline Shaughnessey for the complainant; J. Paul Wearing and Earl Daynes for the respondent; M. Longworth for the intervener.*

DECISION OF THE BOARD; February 17, 1984

1. The style of cause is amended to show the respondents as: “Daynes Health Care Limited” and “Earl Daynes”.

2. At the hearing of this matter on January 31, 1984, the intervening employees, whose present employment is the subject matter of these proceedings, requested an adjournment on the basis that they had received only seven days’ notice of the hearing, and the counsel whom they then retained had not had sufficient opportunity to prepare to meet the issues. The complainant took the position that it was opposed to any adjournment. After deliberating, however, the Board ruled that it was not satisfied with the amount of notice that it had given to the intervening employees in the circumstances of this case, and granted the adjournment.

3. The applicant then asked the Board to order the intervening employees to pay its costs for the day, citing *Metropolitan Toronto Apartment Builders Association*, [1970] OLRB Rep. Nov. 846; *R. T. Construction*, [1971] OLRB Rep. June 342; and *Repac Construction*, [1976] OLRB Rep. Oct 610, in support of the Board’s authority to do so. None of those cases, however, establish that the Board has any independent authority to order costs be paid, outside of the Board’s general remedial authority under section 89 of the *Labour Relations Act*, or of making an undertaking to pay costs a condition precedent to the granting of a request for an adjournment. Whether or not such authority does exist, the Board, for the same reasons which prompted it to find that an adjournment was required, would not consider this an appropriate case to exact costs from the intervening employees as the price of an adjournment. While we are not enamoured with their counsel’s failure to contact counsel for the complainant prior to the hearing, it appears to us highly unlikely that the complainant, who challenged these employees’ very status at the hearing, would have consented to their counsel’s request.

We note also that the manner of proceeding has cost these employees as well a trip from Peterborough and a day before the Board. The request for costs to the complainant is denied.

2215-82-M Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, Applicant, v. **Dominion Stores Ltd.** and **Min-A-Mart Ltd.**, Respondents

Construction Industry Grievance – Practice and Procedure – Grievance relying on related employer provision and naming both companies as respondent – Lawyer on parent company staff settling grievance – Whether union entitled to rely on ostensible authority of lawyer to settle on behalf of both companies – Related employer bound by settlement

BEFORE: D. E. Franks, Vice-Chairman, and Board Members I. M. Stamp and W. F. Rutherford.

APPEARANCES: *Douglas J. Wray and John Cartwright for the applicant; D. W. Brady and Charles R. Robertson for the respondent.*

DECISION OF THE BOARD; February 9, 1984

1. This is the referral of a grievance to arbitration pursuant to section 124 of the *Labour Relations Act*.

2. The original grievance in this matter was filed on January 12, 1983 with the named employer Dominion Stores Ltd. The nature of that grievance is cited as follows:

“sub-contracting work covered by carpenters’ collective agreement to a company not bound by that current agreement. The job location is Min-A-Mart Store, 1910 Yonge Street, Toronto.”

Subsequently, that grievance was referred to the Board pursuant to section 124 by the applicant naming as the respondent Dominion Stores Ltd. and Min-A-Mart Ltd. The reference was made on January 27, 1983 and includes in schedule “C” the following statements:

“1. The Applicant and the Respondent, Dominion Stores Ltd., are parties to and bound by the Carpenters Provincial Collective Agreement.

2. The Applicant will be relying on *Section 1(4)* of the Labour Relations Act and requesting that the Board declare that the Respondent, Min-A-Mart Ltd., is bound by the Carpenters Provincial Collective Agreement and has violated said collective agreement.

3. Alternatively, the Applicant will be relying on *Section 63* of the Labour Relations Act in that there was a sale of a business from Dominion

Stores Ltd. to Min-A-Mart Ltd. with the result that Min-A-Mart Ltd. is bound by the Carpenters Provincial Collective Agreement and has violated said collective agreement.”

3. The matter was set for hearing on February 10, 1983. That hearing was adjourned by agreement of the parties to February 25, 1983. No hearing was held on February 25, 1983, and indeed, on February 28, 1983 the Board endorsed the record as follows:

“Having regard to the agreement of the parties, the Board hereby consents to adjourn this application *sine die* for a period not exceeding one year. Unless within that time, the parties request that the Board proceed with the matter, it will be terminated.”

Subsequently, the applicant requested the Board to re-list the matter for hearing, and by letter dated April 14, 1983 stated:

“The Applicant’s position is that the matter has been settled by the parties and we will be requesting that the Board endorse the record to reflect said settlement.”

Subsequently, the respondent advised the Board that it denied that the matter had been settled. The matter was re-listed for hearing and the Board heard the evidence of the parties concerning the events surrounding the alleged settlement. This matter was treated at the hearing as a preliminary issue, since if the Board found there to be such a settlement, the Board would endorse the record accordingly.

4. The Board heard the evidence of Mr. James Nyman who was acting on behalf of the applicant, and Mr. Charles Robertson, who was at the time of the events in question, a lawyer on the labour relations staff of Dominion Stores Ltd. There is no real dispute as to the events in question. At issue is the interpretation to be given by this Board of these events.

5. As noted above, the referral of the grievance which raised the section 1(4) issue was scheduled for hearing by this Board on Friday, February 25th. On Thursday afternoon there was a call to the firm of Caley and Wray, the solicitors who had filed this referral of the grievance to arbitration from Mr. Robertson. That call was referred to Mr. James Nyman who in turn called Mr. Robertson at his office. Robertson opened the conversation by saying “what will it take to settle tomorrow’s case”. Robertson then proposed to Nyman two points. One, that Min-A-Mart would recognize the carpenters’ provincial agreement for industrial, commercial and institutional construction and, secondly, that there would be no damages payable concerning the dispute in question and the grievance would, in effect, be withdrawn.

6. Mr. Nyman told Mr. Robertson that he would have to check this out with his client, which he did. Mr. Nyman’s evidence on this point is that his client wanted Min-A-Mart to sign a schedule “C” “recognition document” in relation to the carpenters’ provincial collective agreement. Mr. Nyman then called Mr. Robertson and engaged in further discussions. At this point there emerges the only discrepancy in the evidence between Mr. Nyman and Mr. Robertson, namely, whether the schedule “C” issue was raised by Mr. Nyman or not. In any event, in the course of the conversation, both Mr. Nyman and Mr. Robertson agreed that they had agreed to a settlement of the issue involving recognition by Min-A-Mart of the

carpenters' agreement, and that the agreement would involve no damages and the grievance would be withdrawn. Further, that they agreed that the hearing of February 25th would be adjourned *sine die*. In addition, they would both call the Registrar and inform him of the adjournment and Robertson would draft the terms of the agreement.

7. On Friday, February 25th it appears that on a number of occasions during the day, Mr. Nyman phoned Mr. Robertson to check about whether the settlement had been prepared. Late in the day, Robertson eventually contacted Nyman and informed him that Min-A-Mart wouldn't sign the settlement. At no time prior to this did Robertson suggest to Nyman that there was any limit to his authority and in his evidence Mr. Robertson agreed that it was reasonable for Mr. Nyman to assume that he (Robertson) had the authority to speak for both Dominion Stores Ltd. and Min-A-Mart.

8. On the foregoing facts, the position taken by the applicant is quite simple. The applicant, carpenters' union, made a deal to settle the section 124 grievance referral and that Min-A-Mart can't renege on that agreement. The applicant relied on Mr. Robertson's invitation to settle a grievance involving a section 1(4) issue as a representation that he had authority to settle the matter from both Dominion Stores Ltd. the parent company and Min-A-Mart, the allegedly related company. That is, Robertson must be taken as asserting that he represents both companies. The applicant argues that it is entitled to rely on this assertion of ostensible authority, and therefore, requests the Board to endorse the record with the settlement as agreed by the parties. The applicant further notes that it would have been a breach of professional ethics from Mr. Nyman to call the principals and ask whether a solicitor has actual authority in such a matter.

9. The respondent argues that Mr. Robertson did not have the authority to bind Min-A-Mart, and further, that there was no representation by Min-A-Mart as principal to either the carpenters' union or to Mr. Nyman that Robertson had the authority to bind Min-A-Mart. The respondent thus relies on the discussion in *Hussey Seating Company (Canada) Limited* [1981] OLRB Rep. Aug. 1138 at p. 1142:

"13. The doctrine of apparent or express authority has been analyzed in *Freeman and Lockyer v. Buckhurst Park Properties (Magna Ltd.)* [1964] 2 Q.B. 480 (C.A.), the leading case on the subject. In that case a group of four formed a limited company in order to purchase an estate with the intention of reselling it for development. While the four had the power to appoint a managing director, they never did so. Nevertheless, one of the four assumed the duties of a managing director with the knowledge and approval of the others. Without express approval of the others the same person hired a firm of architects and surveyors to prepare an application for planning. The company refused to pay the architects' fees on the grounds that the 'agent' had no authority to enter such a contract. In his reasons for finding that the company was bound by the contract, Diplock, L. J. defined apparent or ostensible authority, in contrast to actual authority as:

a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended

to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract.

Diplock, L. J. cautioned:

...that where the agent upon whose 'apparent' authority the contractor relies has no 'actual' authority from the corporation to enter into a particular kind of contract with the contractor on behalf of the corporation, the contractor cannot rely upon the agent's own representation as to his actual authority. He can rely only upon a representation by a person or persons who have actual authority to manage or conduct that part of the business of the corporation to which the contract relates.

Four conditions which must be fulfilled in order to allow a contractor to enforce a contract entered into on behalf of the company by an agent who has no actual authority to bind the company are set down. These are:

- (1) that a representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the contractor;
- (2) that such representation was made by a person who had 'actual' authority to manage the business of the company either generally or in respect of those matters to which the contract relates;
- (3) that the (the contractor) was induced by such representation to enter into the contract, that is, that he in fact relied upon it; and
- (4) that under its memorandum or articles of association the company was not deprived of the capacity either to enter into a contract of the kind sought to be enforced or to delegate authority to enter into a contract of that kind to the agent.

In the recent case of *Rockland Industries Inc. v. Amerada Minerals Corporation* (1980) 31 N.R. 393, the Supreme Court of Canada referred to Diplock's reasons in *Freeman and Lockyer, supra*, with the approval in accepting his interpretation of the doctrine of apparent authority.

14. This Board has dealt with the apparent or ostensible authority of an on-site representative to bind his employer to a collective agreement in three cases (see *Vic Starchuk & Associates Inc.*, *supra*, *Collegiate Sports Ltd.*, [1977] OLRB Rep. August 487 and *Inspiration Ltd.*, [1967] OLRB Rep. Sept. 562. In *Inspiration Ltd.*, *supra*, the earliest of the three cases, the Board described the issue before it as determining whether or not the company's on-site supervisor had the apparent authority to sign a collective agreement on behalf of the respondent company. The Board went on to state that:

'this (whether the representative had apparent authority) in turn is dependent on two factors, namely, whether David held himself out as having such authority, and whether Ouellette reasonably believed that he had such authority.'

This test was applied by the Board in both *Collegiate Sports Limited*, *supra*, and *Vic Starchuk*, *supra*. In the *Inspiration* case, *supra* the Board found that the on-site representative was the only member of management on the job from its commencement to the time that the agreement was signed, that this representative was responsible for hiring and that he made a representations to the union that he had authority to sign an agreement on behalf of the company. In these circumstances the Board found that both aspects of the test had been satisfied. In *Collegiate Sports Limited* the Board found that it was not reasonable for the union to conclude that the on-site employee with whom contact had been made had the authority to sign a collective agreement on behalf of the company. In the *Vic Starchuk and Associates Inc.* decision, *supra*, the Board came to the opposite conclusion. However, in that case the respondent company made the proper remittances to the union trust funds and to the appropriate association and altered its practice with respect to obtaining carpenters after the purported collective agreement had been entered into. The Board stated that there is 'evidence of a significant change in the respondents conduct dating from Brohman's signing of the collective agreement'. In our view the *Vic Starchuk* decision is based on conduct by the respondent which ratified the prior action of the on-site representative. As we have stated, even if ostensible authority cannot be established the subsequent conduct of the principal may nevertheless serve to ratify the agreement and create an estoppel."

In view of the foregoing, the respondent argues that under the *Freeman and Lockyer v. Buckhurst Park Properties (Magna Ltd.)* case, the applicant is not entitled to rely on any assertion by Mr. Robertson that he has the power to act on behalf of Min-A-Mart.

10. We cannot accept the position of the respondent in the present matter. When Mr. Robertson made the overture to Mr. Nyman to settle this matter, Mr. Robertson was asserting his ostensible authority to act for both Dominion Stores Ltd. and Min-A-Mart Ltd. *since the section 1(4) issue was at the very root of the grievance*. It is clear that Mr. Robertson was either speaking for both Dominion Stores Ltd. or Min-A-Mart or he ought at that point to have made clear to the applicant that he was not acting as the representative of both Dominion

Stores Ltd. and Min-A-Mart. In view of his failure to do so, it was completely reasonable for Mr. Nyman to believe that he had such authority, and we are of the view that the applicant was entitled to rely on his statements. For Min-A-Mart to later take the position that Mr. Robertson did not have authority from them as principal to settle the grievance flies in the face of the fact *that they were named as a respondent together with Dominion Stores Ltd. in this matter*. Accordingly, it is our view that the issue was settled in the discussions between Mr. Nyman and Mr. Robertson, and we propose to endorse the record in this matter accordingly.

11. Therefore, the Board declares that Min-A-Mart Ltd. is covered by a provincial collective agreement in effect between the Carpenters' Employer Bargaining Agency and Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America.

12. Since in the settlement the union agreed to waive any financial claims to damages arising out of the grievance, and indeed, to withdraw the grievance as part of the settlement, it is not necessary for us to make any further declarations or findings with respect to the present matter.

2461-83-R The United Association of Journeymen, and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46, Applicant, v. **Board of Governors of Exhibition Place**, Respondent, v. The Canadian Union of Public Employees, Intervener

Bargaining Unit – Isolated instances of applicant union representing employees with particular skills – Not sufficient to establish “commonly bargain separately and apart from other employees etc...” – No craft unit status

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members H. Kobryn and F. W. Murray.

APPEARANCES: Cynthia Morton and Vince McNeil for the applicant; Brian P. Smeenk, J. Szymanski, D. McEachern and J. McKellar for the respondent; Helen O'Regan for the intervener.

DECISION OF THE BOARD; February 22, 1984

1. This is an application for certification.

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3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

4. The applicant seeks to be certified as the exclusive bargaining agent for "all electronic testing technicians employed by the respondent within the Municipality of Metropolitan Toronto".

5. The application included a request from the applicant to "... consider whether the work performed by electronic testing technicians falls within the existing bargaining unit; ..." described in a subsisting collective agreement between the applicant and the respondent. The applicant withdrew the question when, for reasons given orally at the hearing, the Board required the applicant to advise the Board whether the applicant was contending that the electronic testing technician were included in the bargaining unit described in the collective agreement or excluded from it.

6. The Board also received the representations of the parties on whether the bargaining unit described in the application was appropriate for collective bargaining within the meaning of section 6 of the *Labour Relations Act*. The respondent had alleged in its reply that there was only one employee in the unit and, therefore, it did not satisfy the condition precedent of section 6(1) that there be more than one employee in a unit determined by the Board to be appropriate for collective bargaining. At the hearing, respondent counsel took the position that, even if there were more than one employee in the unit described by the applicant, it would not be a unit appropriate for collective bargaining purposes, whether under subsections 1 or 3 of section 6 of the Act. For these reasons, the respondent contends, the application should be dismissed.

7. Applicant counsel contends that there are three employees in the bargaining unit, two of whom are persons described by the respondent as supervisor of electrical and mechanical services and head of instrumentation controls, respectively. These persons, according to the applicant, perform some of the same work as the one employee named on the lists filed by the respondent. Counsel contends also that the electronic testing technicians constitute a craft unit under section 6(3) of the Act. In the alternative, they do not share a community of interest with any of the respondent's other employees and thus would constitute an appropriate unit pursuant to section 6(1) of the Act.

8. Section 6(3) of the Act sets out three conditions which must be fulfilled if the electronic testing technicians are to qualify for a craft unit:

- (1) They must exercise technical skills or be members of a craft by reason of which they are distinguishable from other employees;
- (2) they must commonly bargain separately and apart from other employees through a trade union that, according to established trade union practice, pertains to such skills or craft; and
- (3) the application must be made by a trade union pertaining to such skills.

When those conditions are met, the unit is deemed to be appropriate for collective bargaining.

9. With regard to the second condition, the Board has required, *inter alia*, evidence of a sufficient bargaining practice by the craft to satisfy the Board that the applicant has a

history of bargaining for the craft. See for example, the Board's decision in *Campbell Soup Company Ltd.*, [1968] OLRB Rep. Feb. 1091, wherein the applicant trade union was seeking craft unit status for a bargaining unit which included employees who exercised skills different to those of the trade union's traditional craft as well as employees of that craft. At paragraph 12, the Board, in commenting on the evidence showing the trade union to have established bargaining rights for similar groups of employees in half a dozen cases, concluded that "... such isolated instances do not establish a 'common' practice ...". The Board came to a similar conclusion in *Pre-Con Murray Ltd.*, [1969] OLRB Rep. Jan. 1003. Both decisions followed the principle expressed by the Board in its decision in *Dupont of Canada, Ltd.*, [1965] OLRB Rep. Jan. 538, that a few isolated incidents of representing in collective bargaining the employees in the craft being claimed does not amount to commonly bargaining separately and apart within the meaning of section 6(3) of the Act.

10. Having regard to that principle, even were the first condition to be made out in this case, the Board is not persuaded that the applicant's representations indicate that the evidence it would be relying on would satisfy the second condition, that is, that the employees commonly bargain separately and apart within the meaning of section 6(3) of the Act. The Board, therefore, is of the view that the unit sought by the applicant would not be a unit of employees deemed appropriate for collective bargaining purposes pursuant to section 6(3) of the Act.

11. Having further regard to the representations of the parties, the Board is persuaded, however, that the applicant's representations raise an arguable issue with respect to whether the unit sought would be appropriate for collective bargaining purposes within the meaning of section 6(1) of the Act. In order to determine that issue it will be necessary to determine the related issues of:

- (1) whether the supervisor of electrical and mechanical services and the head of instrumentation controls exercise managerial function within the meaning of section 1(3)(b) of the Act;
- (2) whether there is more than one employee in the unit; and, if so,
- (3) whether those employees have a community of interest separate and apart from the respondent's other employees.

Therefore, a Board Officer is authorized to inquire into and report to the Board on the duties and responsibilities of the supervisor of electrical and mechanical services and the head of instrumentation controls and on the community of interest, if any, between the persons described by the applicant as electronic testing technician and the other represented and unrepresented employees of the respondent. For purposes of clarity, the Board notes that the respondent refers to the electronic testing technician as electronic instrumentation technician.

12. This application is referred to the Registrar.

1640-83-U; 0791-83-U; 0792-83-U; 0793-83-U; 0794-83-U; 0795-83-U; 0796-83-U
 William Geddes, Complainants, v. Canadian Union of Public Employees – C.L.C.,
 Ontario Hydro Employees' Union, Local 1000, O.H.E.U.), Respondent

Duty of Fair Representation – Unfair Labour Practice – Collective agreement allocating seniority rights in manner detrimental to complainants – Conferring advantage to other employees – Union responding to political issue of conflicting interests within unit – Policy reasons for Board restraint in interfering with union conduct in balancing interests – Balance struck by union objectively justified – No breach of Act

BEFORE: Richard M. Brown, Vice-Chairman.

APPEARANCES: William R. Watson and H. V. Rosemay for the complainants; L. A. Richmond, B. Vincer, J. MacDonald and D. Shier for the respondent; Neil Donnelly for Ontario Hydro.

DECISION OF THE BOARD; February 10, 1984

1. The complainants, employees of Ontario Hydro (the “employer”), contended they had been dealt with by their union (the “OHEU”) contrary to section 68 of the *Labour Relations Act*. The crux of the complaint is that the complainants were not allowed to claim years of service with the employer, but served under the jurisdiction of the Canadian Union of Operating Engineers (the “CUOE”), for the purpose of calculating seniority as it applies to promotions and layoffs in the OHEU unit. One of the seven complainants has filed a complaint on his own behalf and on behalf of eleven fellow employees. For ease of reference, all of these employees will be referred to collectively as the complainants.

I

2. The OHEU has approximately sixteen thousand members who are the vast majority of Ontario Hydro employees. Some employees at the R. L. Hearn Generating Station (“Hearn”) are represented by the CUOE which also represented some of the staff of the J. Clarke Keith Generating (“Keith”) until recently. Other unions are also found within the Ontario Hydro organization. All of the complainants have worked in the past at the Hearn station, under the jurisdiction of the CUOE. Moreover, each one of them transferred, between April 1, 1977 and June 30, 1980, from Hearn to jobs within the OHEU bargaining unit. The time at which these transfers took place is of great significance. The OHEU collective agreement that came into force on April 1, 1977 provided in Article 10.1 that:

No person shall be appointed to a position in the OHEU jurisdiction until all qualified OHEU represented applicants have been selected. This restriction is limited to situations involving interunion jurisdiction and does not apply to nonunion personnel. *If an Ontario Hydro employee is appointed to a position with the OHEU jurisdiction from a bargaining unit*

which restricts seniority in Ontario Hydro to its own membership, his seniority will be limited to service within the OHEU bargaining unit.

(emphasis added)

The last sentence of this provision, which had not appeared in the preceding contract, lies at the heart of this dispute. The definition of seniority for the purpose of layoffs, found in Article 11.1(c), was also amended in 1977 to incorporate the restriction added to Article 10.1. These amendments have been continued in each subsequent collective agreement. The impact of the new arrangements on employees transferring to the OHEU unit from the CUOE unit depends upon the CUOE's collective agreement. The case at hand was argued by all parties on the common assumption that the CUOE agreement in force on April 1, 1977 defined seniority by reference to service in the CUOE unit. Consequently, a long-standing Ontario Hydro employee who entered the OHEU unit, from the jurisdiction of the CUOE, after April 1, 1977 had no seniority for the purposes of promotion and layoff. But the CUOE contract was later changed, effective July 1, 1980, to define seniority by reference to an employee's established commencement date with Ontario Hydro. Employees who transferred from the CUOE unit to the OHEU unit after July 1, 1980 retained their full corporate seniority. The complainants do not contest the OHEU's initial refusal to recognize their previous service with Ontario Hydro when they transferred into the OHEU unit between 1977 and 1980. They concede that this was the effect of Article 10.1 and that the way they were then treated did not violate section 68. The complaint is that after 1980 the OHEU continued not to acknowledge their service under the CUOE's jurisdiction, whereas employees who transferred after 1980 retained their full corporate seniority.

3. A brief description of the constitutional structure of the OHEU is required to fully understand how the seniority fence came into being and how the union reacted to the complainants objections made when the fence was taken down. One chief steward is elected from each of ninety-seven units, and a council composed of all chief stewards elects from within its ranks the president, first vice-president and three second vice-presidents. These five officers comprise the executive committee. Union members are also divided into eighteen divisions and the chief stewards from each division elect one of their number to be the divisional chairman. The eighteen divisional chairmen together with the five executive officers constitute the executive board. The constitution designates the executive board as the bargaining committee, but since 1972 negotiations have been carried on at the central bargaining table by a smaller group, consisting of the first vice-president and six divisional chairmen drawn from the six sections of Ontario Hydro operations – maintenance, electrical operators, weekly salaried, construction, thermal and nuclear. Issues relating only to one section are addressed at a side table by a sub-committee comprised of one member of the central bargaining committee and two other people from that section. Not surprisingly, seniority matters are typically discussed at the big table.

4. Jack MacDonald, the first vice-president of the OHEU, gave evidence about the history of Article 10.1. He participated in the 1972 negotiations and has been the chief union negotiator in all subsequent rounds of bargaining. When the parties arrived at the bargaining table in 1972, the OHEU negotiators were concerned by the manner in which the recently opened plant at Nanticoke had been staffed. Although this plant was within the OHEU's jurisdiction, some jobs were filled by people drawn from the CUOE unit, rather than by OHEU

members, who may have wished to transfer to Nanticoke from elsewhere. The OHEU proposed that Article 10.1 be amended to say: "No person shall be appointed to a position in the OHEU jurisdiction until all qualified OHEU applicants have been selected." The union won this change, but only by adding a qualification: "This restriction is limited to situations involving interunion jurisdiction and does not apply to non-union personnel." The new contract failed to achieve the protection that the OHEU had sought for its members, because Article 10.1 applies only to advertised vacancies, and vacancies for all jobs below journeyman or below grade fifty-five are "non advertisable". When the J. Clarke Keith Generating Station, a thermal plant in Windsor, was shut down in 1976, displaced CUOE members who were barred from advertised OHEU jobs by Article 10.1, successfully applied for "nonadvertisable" jobs in the OHEU unit. Once inside, by calculating their seniority by reference to service in both units, they won advertised promotion for coveted jobs, to the detriment of other employees who had been OHEU members for longer than the successful applicants but who joined Ontario Hydro after they did. The OHEU reacted in 1977 to this perceived injustice to its members by proposing that seniority be defined to mean length of service within the bargaining unit. This amendment would have denied recognition to employment in either a non-union job or under the jurisdiction of any other union – even one that embraced a broader definition of seniority. Ontario Hydro responded by suggesting that the OHEU erect a seniority fence that would apply only to members of another union which had a similar fence for OHEU members. This counterproposal became the last sentence of Article 10.1 which has remained unchanged ever since.

5. Between 1977 and 1980, while the seniority fence was in place, approximately ninety employees transferred from the CUOE to the OHEU. Twelve of the complainants left the Hearn station, and the jurisdiction of the CUOE, in early 1979 to take up jobs at the Bruce Nuclear Generating Station A ("Bruce A"), within the OHEU unit. Among this group were William Geddes and Dan Boydell. According to them, the transfer was preceded by an announcement from Ontario Hydro that the staff complement at Hearn was to be reduced as nuclear power plants came on stream and that this would be the only opportunity to transfer to the nuclear. Approximately seventy-five employees applied for a transfer and wrote aptitude tests; twenty-eight were selected of whom twelve went to Bruce A where they have undergone extensive re-training. The twelve complainants were fully aware that they would not be carrying their accrued seniority with them to the Bruce A station within the OHEU unit. Geddes and Boydell testified that they had been told that expansion of the nuclear division would be so rapid that the loss of seniority would not impede promotion. The complainants at Bruce A did not know until the spring of 1983 that the seniority fence had been taken down. At that time, they learned that the Hearn station was being shut down and that some of the displaced employees were to enter the nuclear division as operators with full corporate seniority recognized under the OHEU contract. That is exactly what happened. These new OHEU members have leapfrogged over those who entered the OHEU unit between 1977 and 1980. Three of the recent transferees were hired after Geddes joined Ontario Hydro in 1966 – Phil Dessa in 1970, Al Marino in 1970 and John Law in 1972 – but are now above him on the OHEU seniority list, even though they also have less service in the OHEU unit. Dan Boydell is one of the Bruce A complainants and a shop steward. Upon learning that the seniority fence had been removed, he spoke to his chief steward, Dan Heffernan, who suggested writing a letter to the Union's executive committee. Boydell and another employee wrote a letter, Heffernan reviewed it, and Boydell signed it on behalf of the eleven other Bruce A complainants.

6. The other six complainants transferred from Hearn to other Ontario Hydro plants within the OHEU unit. Angello Connistraci, a handyman, who went to the Lakeview Generating Station ("Lakeview") in March 1980, testified that he was told, at the time of his transfer, by personnel officers, at both Hearn and Lakeview, and by a foreman at Lakeview that he would not lose his seniority. According to Connistraci, his chief steward, John Sarginson, later confirmed that he had retained his full seniority. Victor Rosemay, also a handyman, left Hearn in 1977 to become an OHEU member in Thunder Bay, fully aware that he was leaving his accrued seniority behind. However, he believed that Article 10.1 of the OHEU contract protected him against those who later would leave the Hearn station from the OHEU. According to Rosemay, others who transferred with him wrongly believed they had not lost their seniority because John Sargenson had told them so. In February or March 1983, Rosemay learned that people leaving Hearn at that time were entering the OHEU unit with full corporate seniority. Rosemay complained in May to his chief steward, Tom Gibbons, that Article 10.1 was an "illegal clause".

7. The impact of removing the seniority fence on those who transferred while it was in place began a topic of discussion both between the OHEU and Ontario Hydro and within the union's governing bodies before the complainants raised the topic. During the term of the 1980-82 collective agreement, the employer's manager of industrial relations wrote to Bill Vincer, the president of the OHEU, suggesting that employees who had transferred from the CUOE unit to the OHEU unit between 1980 and 1982 be accorded full corporate seniority. According to Vincer, this proposal was reviewed by the executive committee which rejected it. The committee acknowledged the "unfairness" of recognizing the full corporate seniority of employees who transferred after 1980, but not of those who entered the OHEU unit between 1977 and 1980. But the committee members could not undo this inequity, in the manner proposed, without adversely affecting other long-standing OHEU members. The executive committee also considered eliminating the inequity by not recognizing the corporate seniority of those who transferred after 1980, but Vincer was convinced the employer would reject this suggestion, especially made during the term of a collective agreement when there is little room for give and take. MacDonald testified that a mid-contract change on an issue like seniority – which puts one group of employees against another – is unwise because any amendment would not be subject to ratification by the membership. The employer unsuccessfully advanced the same proposal when negotiations for a new collective agreement began in 1982.

8. Within the union, there were differences of opinion between the thermal chief stewards and some of their counterparts on the nuclear side. Whenever the matter was raised at thermal divisional meetings, the fear of layoffs invariably produced a consensus to maintain the status quo. The first such discussion occurred shortly after the fence was removed in July, 1980. Sometime in late 1982 or early 1983, some of the nuclear chief stewards proposed that the aggrieved employees be allowed to use their full corporate seniority to obtain promotions, but not to avoid layoffs. This compromise was rejected at thermal divisional meetings. According to David Shier, a thermal chief steward at the time, the thermal chief stewards were well aware that people entering the OHEU unit after 1980 were leapfrogging over those who joined the union between 1977 and 1980. However, the thermal division took the view that the plight of these individuals did not outweigh the prejudice a change would pose to long-standing OHEU members seeking promotions in the nuclear division or trying to retain their jobs in the thermal division. In February 1983, the position of former CUOE members who entered the OHEU's jurisdiction between 1977 and 1980 was considered by the executive committee. The minutes of the meeting note the opposition of the thermal division to any

change. When these minutes were reviewed at an executive board meeting in June, 1983, Dan Hefferman and others pleaded the case of those who were denied corporate seniority. No decision was taken by either the executive committee or the executive board, so the status quo prevailed. By this time OHEU members in the thermal division had been laid off and other layoffs had been announced or were anticipated. According to MacDonald, the executive board was primarily concerned about layoffs, but was unwilling to distinguish between promotions and layoffs so as to allow the aggrieved employees to invoke full corporation seniority in the context of career advancement but not redundancies. Although MacDonald recognized the plight of the aggrieved employees, he believed the union was obliged to protect those OHEU members who had been paying dues since before the complainants entered the OHEU unit. The first six complaints were filed before Bill Vincer replied to Dan Boydell's letter to the executive committee. Vincer's response held out little hope to the Bruce A complainants:

Noel MacIntosh tabled your letter of July 27th at the Executive Committee meeting of August 16-19th, 1983.

The Executive Committee understands the situation only too well and recognizes the problem of using bargaining unit seniority during the period 1977-1980. As you pointed out in your letter, the members who were junior at R.L. Hearn and who were transferred after 1980, have now a greater seniority than other R. L. Hearn members for the purposes of both promotion and lay-off/recall.

However, to restore Corporate seniority to those who came into the bargaining unit during the fence clause period would adversely affect many members whose total service was with our bargaining unit. This has been a particular problem at the Lakeview G.S.

Therefore it becomes a matter of whose interest is affected if we were to attempt to have the effects of the fence clause nullified.

We have had several Section 68 complaints filed with the Ontario Labour Relations Board by ex-CUOE members at Lakeview GS, seeking complete restoration of seniority. If we were to do this, other members at Lakeview GS would have their seniority affected and they would charge us with discriminatory practices before the Ontario Labour Relations Board.

The situation is a catch-22 and the Executive Committee has decided to retain the status quo.

This issue has been discussed at the Executive Board in the past and I am sure your Divisional Chairman, Dan Hefferman, will be raising it again at the September Board meeting.

I am enclosing a number of copies of this letter so that you may discuss it with the various members on whose behalf you were speaking.

The issue was raised at an executive board meeting in September but was not discussed, because it was by then before this Board.

9. The union has submitted proposals to the employer for the renewal of the current agreement which expires on March 31, 1984. The proposed Article 10.1 is as follows:

No person shall be appointed to a position in the OHEU jurisdiction until all qualified OHEU represented applicants have been selected. If an Ontario Hydro employee is appointed to a position within the OHEU jurisdiction, their *seniority* will be limited to service within the OHEU bargaining unit. Master seniority lists supplied to the OHEU will represent this.

The effect of this proposal would be to strip employees entering the OHEU after March 31, 1984 – from the CUOE or elsewhere – of their acquired service. This submission was apparently suggested by one or more employees in the OHEU unit. None of the complainants have ever formally submitted a bargaining proposal to amend Article 10.1; nor have any of them filed a grievance to challenge the union's interpretation of this article.

10. Ontario Hydro prepares, and provides to the OHEU, a list of all members showing their established commencement date ("ECD") with the employer. This document is commonly referred to as the seniority list. Except for the employees who entered the OHEU unit from the jurisdiction of the CUOE between 1977 and 1980, the ECD is the date by reference to which seniority is determined. According to Bill MacDonald, the union has also received another list from the employer, on two occasions – one dated October 1980 and one May 1981 – showing the exact date upon which employees who transferred while the fence was in place became OHEU members. The second list is prepared for the purpose of calculating the seniority of employees in this category. Despite Article 10.1 and this list, two such employees have invoked their full corporate seniority in the context of a promotion or a transfer. Norm Kearney and Alan Cain both left the CUOE, for the OHEU, on May 20, 1980. According to Kearney, Bob Kennedy, the Hearn station manager, told him at the time that he would be "taking everything" with him, and Kearney understood this to include full corporate seniority. (Kennedy was the chief spokesman for Ontario Hydro in 1977 when Article 10.1 was negotiated in its present form.) Shortly after Kearney took up his new post at Pickering Nuclear Generating Station B ("Pickering B"), he was told by his shop steward, Frank Butler, that he had "just crept in": Kearney interpreted this in the same way as he had Kennedy's comment, and now cannot recall whether Butler's remark was made before or after the seniority fence came down on July 1, 1980. After leaving the CUOE, Cain went first to the Keith station, before moving to Pickering B in the fall of 1980. Some months later, he saw a seniority list in the possession of William Little who was at the time his first line supervisor and his chief steward. Cain's commencement date with Ontario Hydro appeared on the list. Cain asked Little if this was the proper seniority date, and Little later reported that it was. Upon learning of these complaints, Cain again asked Little who once more looked into the matter before confirming his earlier answer. Before answering either of Cain's inquiries, Little talked to Archie McMillian, the divisional chairman for the field forces division in which both Cain and Kearney worked. McMillian explained that there had been a seniority fence, but it no longer existed. Without checking the date of Cain's transfer, McMillian assumed it was after the fence was abolished, and so told Little that Cain retained his full corporate seniority. According to McMillian, the fence was never a major issue in his division, because Cain and Kearney are

the only two employees to enter it from the CUOE. In 1981, Kearney applied for and was awarded a supervisory job, showing on the application his date of hire at Ontario Hydro as his seniority date. He has also avoided an unwanted lateral transfer by invoking his corporate seniority. In the fall of 1983, Cain obtained a desired transfer by claiming his full corporate seniority.

11. Both Vincer and MacDonald testified they were not aware of the seniority status of Kearney or Cain until after this complaint was launched. According to Vincer, if these complaints fail, their seniority will be adjusted in accordance with their date of entry into the OHEU unit. Vincer was aware that some former CUOE members who transferred to Pickering, between 1977 and 1980, had been told by the employer that their service in the CUOE unit would be recognized. He was told of these representations by Malcolm Mentior, a chief steward, who was unable or unwilling to identify the management representatives or employees involved, despite Vincer's inquiries. Vincer testified that he recounted these representations at a training course for stewards in October, 1983, saying this information was wrong. Frank Morris, one of the complainants, was in the class and testified that Vincer said some transferees kept their corporate seniority "through a sneaky management deal". Vincer denied making this comment. The OHEU cannot be held responsible for these isolated instances in which the employer departed from its general practice in administering Article 10.1.

12. Also at the October training course, Bill MacDonald commented upon Dan Boydell's expressed intention to file a section 68 complaint. MacDonald admitted saying that Boydell could be charged under the union constitution for "indiscretely" invoking section 68 and could be forced to reimburse the union for the costs of defending a complaint. At the hearing, Mr. MacDonald appeared to recognize that this remark was not wise.

13. Under the OHEU collective agreement, seniority is a factor to be considered in most layoffs and promotions. As noted above, seniority does not apply to the filling of vacancies in "nonadvertisable" positions – those below journeymen or grade fifty-five. For other non-supervisory jobs, seniority is the "governing factor" in choosing among qualified applicants, pursuant to Article 10.2(b). In contrast, Article 10.2(c) provides that "primary consideration should not be given to seniority" in relation to supervisory positions. Seniority also applies to layoffs, pursuant to Article 11, except in construction – the division in which Cain and Kearney work – where redundancies are dealt with by way of lateral transfers, which are also governed by seniority. The restriction imposed on seniority by Article 10.1 in the context of promotions is carried over to layoffs by Article 11.1(c).

II

14. The primary thrust of the complaint is not that the union has failed to enforce the collective agreement, but rather that the agreement is unlawful. The complainants sought to impugn the way that the OHEU has allocated seniority rights to their detriment and to the advantage of other union members. The accommodation of conflicting claims asserted by employees within a bargaining unit, either as individuals or as groups, is one of the primary functions of a trade union. Although perhaps less visible to the public eye, this function is no less important than a union's role in the resolution of disputes between labour and management. Conflict within a bargaining unit is inevitable and pervasive, not only at the bargaining table, but also in the grievance process. In negotiations, for example, a union must decide how the money won from management is to be divided: negotiators may be called upon

to choose between a generous adjustment for a small group with special skills or a slightly higher across-the-board wage increase for everyone. Similar hard choices arise in the administration of a collective agreement. When an employee asks that his or her grievance be carried to arbitration, union officials must weigh that person's claim – determined by such factors as the interest at stake and the probability that the grievance can be won – against competing concerns – including any conflicting job interests of other employees, as well as the collective interest in saving the limited capacity of the grievance process for deserving cases and in conserving union funds. The exclusive authority of a union to represent all employees empowers it to conclude collective agreements and to settle grievances, while precluding individual employees from dealing directly with their employer. But the authority of a bargaining agent to balance competing interests is tempered by the duty of fair representation, set out in section 68 of the *Labour Relations Act*:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

15. To fulfill this duty during collective bargaining a union must consider the competing interests upon which a decision will impinge. See *Dufferin Aggregates*, [1982] OLRB Rep. Jan. 35, at para 24. However, the Board will defer to any accommodation that falls “within a wide range of reasonableness”. This limited scope of review, first enunciated by the United States Supreme Court in *Ford Motor Co. v. Huffman*, 31 LRRM 2548 (1953), was reiterated in *Dufferin Aggregates*, *supra*, at para. 37. The large measure of deference entailed in this standard of review is nicely illustrated by the facts in *Ford Motor Co. v. Huffmen*. The Court upheld a collective agreement that recognized military service for the purpose of calculating seniority – even though service in the armed forces is more closely related to the national interest than to employment.

16. Labour board restraint is amply justified in the context of either negotiations or contract administration, because interest balancing is a political task not readily amendable to legal regulation. But conduct at the bargaining table should be reviewed with even greater restraint than grievance processing. One reason for this sliding standard of review is best illustrated by contrasting two fair representation complaints – one aimed at a disadvantageous differential in wages contained in a collective agreement and the other alleging a failure to arbitrate a suspension pursuant to a just cause clause. The complainant who attacks the wage structure is disappointed that his or her hopes were not fulfilled, but the other employee has been denied the protection prescribed in the contract. An employee claim rooted only in hope carries less weight than one derived from a collective agreement.

17. There is another, more cogent, reason for a special measure of deference to the interest balance struck at the bargaining table – a collective agreement requires the approval of both union and employer. A bargaining agent may initially formulate contract proposals that do not offend any employees only to be met by counterproposals from management that strike a different balance of interests. A compromise must then be fashioned, often with a strike or lockout imminent, without time for leisurely reflection. This atmosphere must be borne in mind when fair representation complaints are adjudicated. The requirement of mutual consent

and the potential for economic conflict highlight another distinction between negotiations and contract administration. At the bargaining table, the only lever available to a union is economic pressure, whereas in the grievance process a recalcitrant employer can be brought before an arbitrator. A ruling that a union unfairly represented a group of employees by agreeing to management demands in negotiations is tantamount to saying that a strike should have been called. A union decision not to strike deserves greater respect than a determination not to arbitrate a grievance, because a work stoppage often entails severe hardship for employees and their families. In addition, applying the duty of fair representation in a way that promotes strikes is not in the public interest. Management also has a stake in defining the scope of the duty of fair representation, as the more strictly a union is regulated, the greater is the corresponding restraint on an employer's freedom of contract.

18. Legal restraint is required, but so long as numerical majorities occasionally yield to selfishness or caprice, some checks on union conduct are also necessary. To what sources should a labour relations board look in defining these limits? Professor Cox has offered an answer:

Statutory policies may occasionally measure what is "fair". The Railway Labor Act and the National Labor Relations Act embrace the policy of assuring employees full freedom of choice in selecting bargaining representatives. For a union to differentiate between members and nonmembers in negotiating a contract or handling grievances is "unfair" because it runs counter to the statutory policy unless justified by a valid union shop agreement.... Conversely, the statutory preferences granted veterans in public employment were given weight in upholding a collective bargaining agreement which gave veterans in private employment a seniority rating based partly upon military service.

A judgment of "fairness" in any context, also depends partly upon finding the actor's motivation, partly upon reason and partly upon conformity to accepted norms. Industrial and collective bargaining practice will, therefore, shed considerable light on the fairness of particular contracts, and a court should hesitate to invalidate a negotiated solution of a kind which has gained a measure of acceptance in other bargaining units. Conversely, a sudden reversal of an established practice may require affirmative justification not only because it defeats the expectations of individual employees but also because general acceptance of the prior arrangement showed it to be *prima facie* fair and reasonable. Beyond this, however, guides must be found in the normal standards of the industrial world and the precepts of the community. Doubts should be resolved in favor of collective bargaining unless the minority claims infringement of civil liberties. (Cox, "The Duty of Fair Representation" (1957), 2 Vill. LR 151, at 167 to 168).

19. As a general rule, a union's actions ought to be reviewed less closely in the context of collective bargaining than grievance processing. But within the range of issues negotiated by a bargaining agent, some merit closer scrutiny than others. The rules that govern the assignment of work have been singled out for special treatment. Seniority plays an important part in deciding who is to be promoted, laid off or recalled, in most collective bargaining

relationships. In *B.C. Distillery Company*, [1978] 1 CLRBR 375, the British Columbia Labour Relations Board observed that employees are well aware of their place on a seniority list, believe that rank has been earned through long service, and firmly expect that their position will remain unchanged. The Board concluded that decisions about seniority merit “a considerably greater degree of scrutiny” than those relating to the compensation package. Citing *B.C. Distillery Company* with approval, this Board followed the same tack in *Dufferin Aggregates*, *supra*, and required a trade union to demonstrate an “objective justification” for changing the method by which work was distributed. Initially, the available work was shared among a group of employees who owned and operated trucks. But there was too little work to meet their high overhead costs, and those with the smallest financial reserves were faced with bankruptcy. In these circumstances, a decision was made to amend the collective agreement by abolishing work sharing and substituting layoff in reverse order of seniority. The Board ruled that the union acted with objective justification, in a crisis situation, when it abandoned an arrangement that favoured employees with the largest financial reserves, choosing instead to give preference to those with the greatest seniority.

20. A more typical factual backdrop for a section 68 complaint is the integration of seniority lists upon the merger of two workforces. In this context, like any other, the duty of fair representation must be elaborated with sensitivity to the hard choices faced by a trade union. A very thoughtful and thorough discussion of those choices is found in Kennedy, “Merging Seniority Lists” in *Proceedings of the 16th Annual Meeting of the National Academy of Arbitrators*, (1963). Two common methods of integrating seniority lists are “end tailing” – whereby one list is added to the bottom of the other – and “dovetailing” – whereby a new list is established by reference to each employee’s date of hire. End tailing is perceived by many in the industrial relations community to be inequitable, as it gives the employee at the bottom of one seniority list priority over the person at the top of the other, regardless of their respective years of service before the merger. This is unfair if years of service is perceived to be a criterion of independent value in the assignment of work. The result may also be inequitable when viewed from another perspective. Merging seniority lists in this way frequently increases the job opportunities open to the employees at the top of the new list, at the expense of those who are endtailed. Such windfall gains and losses occur whenever the enterprise that previously employed the endtailed employees contributes employment to new joint venture, because the group at the top of the integrated seniority list is granted a preferential claim to this work which, but for the merger, would have been enjoyed by the other employees. There are obviously no windfall gains or losses when the employees who are endtailed bring no work with them into the consolidated bargaining unit. Dovetailing solely by reference to years of service also produces inequities in some cases, making one group better off than they would have been in the absence of the merger, to the detriment of the other, as Kennedy has illustrated (*supra*, at 15):

Unfortunately, under certain circumstances when the length-of-service principle is employed exclusively, major windfalls do occur. These inequities which occur arise from the fact that the value of an employee’s seniority rights derives not just from his length of service but also from (1) the length of service of other employees on the list, and (2) the amount of work which is available.

In plant A a full ten years or service may leave an employee at the very bottom of the list, the first person to be laid off in case of curtailment

and the last to be hired or to be considered for recall, promotion, etc. In plant B only two years of service may place an employee at the very top of the seniority list, the last person to be laid off in case of curtailment and the first to be considered for recall, promotion, etc. When plant A and plant B are consolidated, if the seniority lists are merged solely on the basis of length of service, the employees from A gain a windfall at the expense of the employees from B who suffer a loss in the value of their seniority rights.

In plant C there may be ample work available for all of the employees on the list, whereas in plant D work may be available for only one-half of the employees. Even assuming that the average length of service and the spread of length of service in each plant seniority list is identical, an employee in plant C with two years of service is assured of steady work, whereas an employee with ten years of service in plant D may be unemployed. If these two groups are combined solely on the basis of length of service, it is clear that the employees from plant D will gain a windfall at the expense of the employees from plant C.

Kennedy has also demonstrated that these problems can be alleviated by devising a formula that gives some weight to the ranking of employees on the original seniority lists and/or to the volume of work contributed by each enterprise. If years of service is thought to be a criterion of independent value, it can also be factored into the equation. Any of these combination formulas are more difficult to administer than either dovetailing or endtailing. According to Kennedy, each of the arrangements described is widely used in at least some industries.

21. In deciding how to integrate two seniority lists, a bargaining agent must consider the interests of both groups of employees – not only those previously represented by the union, but also those who just recently entered its jurisdiction. The duty of fair representation is owed to all employees, no matter how long they have been a member of the bargaining unit. A union may not totally ignore one group of employees simply because they have no seniority rights under its agreement before the seniority lists are integrated. In other words, an existing collective agreement cannot be a complete defence to a section 68 complaint that challenges the legality of that contract. This does not mean that the interests of the two groups are always equal in magnitude. The interests of recent entrants to the unit are rooted in the collective bargaining relationship under which they formerly worked, and the force of the claim asserted by them depends upon such factors as their length of service and rank in that unit as well as the employment opportunities contributed to the new joint venture by the enterprise that previously employed them. The weight of the countervailing interests of the original employees in the unit is partly determined by their years of service and ranking. But apart from such factors, these employees have a stronger claim than anyone else to the job opportunities to which their seniority rights would have attached in the absence of the merger.

22. The American courts have imposed another restraint on the integration of seniority lists. A trade union may not allocate seniority rights in a manner that favours the majority for the sole purpose of pleasing the largest number of employees. See *Ferro v. Railway Express Agency Inc.*, 296 F. 2d 847, 49 LRRM 2279 (CA 2, 1961); *Truck Drivers, Local 568 v. NLRB*, 379 F. 2d 137, 65 LRRM 2309 (CA DC, 1967); *Barton Brands Ltd., v. NLRB*,

529 F. 2d 793, 91 LRRM 2241 (CA 7, 1976). Professor Cox has similarly rejected the principal that “to the lion belongs the lion’s share” (*supra*, at 163). The Board has not been faced with a case of this nature.

23. So long as the interests of both groups are considered and there is no tyranny of the majority, a trade union ought to be granted a broad discretion to do as it sees fit. The duty of fair representation is not violated by any decision that is objectively justified. This Board has approved both endtailing and dovetailing: see *Silverwood Dairies*, [1982] OLRB Rep. Aug. 1199; and *Dufferin Concrete Products*, [1983] OLRB Rep. Dec. 2014. The dovetailing of seniority lists was upheld by the United States Supreme Court in *Humphrey v. Moore*, 375 US 335; 55 LRRM 2031 (1964), because the decision rested on length of service in the two companies, a “wholly relevant consideration”, and not on “capricious or arbitrary factors”. Similarly, endtailing has been approved when adopted for legitimate reasons. In *Schick v. NLRB*, 400 F. 2d 395 (CA 7, 1969), two groups of employees – freight drivers and meat drivers – worked for the same employer under the jurisdiction of different local unions. As there was not enough work to keep all of the meat drivers fully employed, some of them were transferred to the freight division where they were placed at the bottom of the seniority list. When they launched a law suit, the court deferred to the union’s decision to protect the original freight drivers – whose economic prospects were brighter than their co-worker’s before the merger – against any erosion of employment opportunities.

III

24. Did the OHEU violate the duty of fair representation by refusing to recognize the complainants’ total years of service with Ontario Hydro? Their complaint could be formulated in three different ways. The first is that the OHEU is obliged by section 68 to recognize the full corporate seniority of any employee who transfers into its bargaining unit. The second formulation accepts that the union could properly refuse to acknowledge service outside the unit for all employees: the objection is that the OHEU has not treated all employees who transferred into the unit in the same way. In particular, the complainants may claim only their years of service as OHEU members in contests with employees who were OHEU members before they were, whereas some transferees are granted full corporate seniority in such a competition. Even this objection is conceded by the final formulation of the case. The focus of the only remaining complaint shifts from the complainants standing in relation to employees with less corporate seniority, who entered the OHEU unit *before* they did, to the disadvantaged position which the complainants occupy when competing with some employees who became OHEU members *after* they did, but who retain full corporate seniority. Although the first formulation was abandoned by the complainants, an assessment of it is necessary to fully understand the other two grounds of complaint.

25. The first way of formulating the complaint can be tested by assuming that the collective agreement provided that all new entrants to the bargaining unit were to be endtailed on the seniority list, and by then asking if this arrangement would be legal. This is the precise arrangement which the OHEU has consistently, but unsuccessfully, sought over the years, at the bargaining table. The reason advanced by the OHEU in support of this arrangement is that long-standing members of the union, who have paid dues over the years, are more deserving than new entrants to the bargaining unit. Service in the unit represented by the respondent union is not an irrelevant criterion. And in this case there was particularly good reason for the union to staunchly defend its long-time members. Within the shrinking thermal

division, former CUOE members transferring into the OHEU unit brought no work with them. Recognition of their corporate seniority would not only give them more than they could have expected under the CUOE agreement, which applied to a dwindling pool of jobs, but also would have jeopardized the employment security of OHEU members. The nuclear division has expanded as the thermal division contracted. But despite this recent growth on the nuclear side, many of the new, nuclear jobs created in the OHEU unit are different than those formerly performed by the complainants in thermal plants under the jurisdiction of the CUOE. The difference is clearest in the case of operators who have undergone extensive retraining. Consequently, the complainants' claim to new job opportunities in the nuclear division is not clearly superior to the claim asserted by employees with longer service in the OHEU unit. In short, the OHEU would not have violated section 68 by agreeing to fix the date of entry into the OHEU as the seniority date for all employees.

26. But not everyone has been treated in this way. Unlike the complainants, some employees can call upon their corporate seniority when competing with employees who became OHEU members before they did. The recognition of corporate seniority for some, but not all, employees who have transferred into the OHEU unit is the genesis of the second formulation of the complaint. If the OHEU had consciously set out to favour some employees over others in this way, it might well have been found in contravention of the duty of fair representation. But the OHEU's consistent position at the bargaining table over the years has been that all employees entering its unit should be entailed on the seniority list. On the other side of the bargaining table, Ontario Hydro has espoused corporate seniority for all. The compromise negotiated in 1977 entailed only some employees. At that time, union negotiators no doubt realized that employees who transferred from the CUOE while the seniority fence was in place would be in a worse position than those entering the unit from elsewhere. But former CUOE members posed the major threat to employees in the OHEU unit, and Ontario Hydro was only willing to restrict the seniority of employees transferring from the CUOE unit, so the OHEU accepted this degree of protection for its members. The seniority restriction was not applied to former CUOE members who transferred before 1977, presumably because of a distaste for retroactive application. During negotiations in 1977, no one thought about what would happen if the CUOE dropped its seniority fence, thereby altering the impact of Article 10.1 to grant full corporate seniority to employees who subsequently transferred from the CUOE unit. This situation was not assessed by the OHEU until it arose in 1980. Senior union officials then realized that past CUOE members who transferred after 1980 would not be deprived of their corporate seniority, unlike those who had transferred between 1977 and 1980. The inequity could have been remedied by recognizing the complainants' total years of service with Ontario Hydro, but only at the cost of relinquishing the only foothold that the union had secured in its ongoing battle to establish a general rule that all new entrants to the bargaining unit should be entailed on the seniority list – a perfectly legal objective in this case. In these circumstances, the OHEU could properly deny corporate seniority to the complainants in contests with employees who entered the OHEU unit *before* they did, even though other employees who also transferred into the unit were allowed to claim their total years of service with Ontario Hydro in such competitions. There was objective justification for the union's conduct.

27. But this conclusion does not absolve the OHEU of liability on the remaining branch of the complaint. The most troublesome aspect of this case is that a complainant has less seniority in the OHEU unit than some employees who have *less service* in the OHEU unit, as well as with Ontario Hydro. The preferred group is made up of employees with a date of hire earlier than the complainant's transfer into the OHEU, who were not deprived of corporate

seniority when they followed the complainant into the OHEU unit. The group that has leapfrogged over the complainants on the OHEU seniority list in this way includes former CUOE members, who transferred after 1980, and employees who entered the OHEU unit from elsewhere. The greatest threat to the complainants' job interests is posed by those from the CUOE unit, because their job functions are similar to the duties performed by the complainants. William Geddes was able to identify three fellow operators who have bypassed him on the OHEU seniority list. Did the OHEU's conduct in the face of this acknowledged inequity violate section 68? Remember that the OHEU did not intentionally create the problem. A product of the amendment made to Article 10.1 in 1977, it was not foreseen at that time. This inequity was first identified by the complainants in the spring of 1983 when former CUOE members leapfrogged over them on the seniority list. There is no evidence that OHEU officials were aware of this particular problem at an earlier date. Given the inevitable limitations of human foresight, they could not be faulted for not anticipating the problem before it was manifest. In the fall of 1983, the union tabled an alteration to Article 10.1 that would partially alleviate the complainants' plight. To understand the solution, one must begin with the problem. It arises because seniority contests between a complainant and an employee with less service, both in the OHEU unit and with Ontario Hydro, are resolved by reference to the complainant's unit service and the other employee's corporate service. The union's current proposal, if incorporated in the 1984 agreement, will define the seniority of employees who become OHEU members *in the future* by reference to their years of service in the unit. Consequently, a contest between a complainant and such an employee will be equitably resolved by applying the same measuring stick – service in the unit – to both. The solution proposed is only partial because an employee who entered the unit between 1980 and 1984, and leapfrogged over the complainants, will continue to enjoy priority over them. But the only remedy for this inequity would be a retroactive amendment to Article 10.1, which would revise the existing seniority list to the detriment of employees who became OHEU members between 1980 and 1984. Given the circumstances, the union's response to the complainant's plight is objectively justified. Its conduct to date has not contravened section 68.

28. But Ontario Hydro is likely to resist the union's proposal, because it would go beyond remedying this inequity to totally abolish the concept of corporate seniority for the future. The proposal would define the seniority of all employees who transfer into the OHEU in the future by reference to their date of entry to that unit. In other words, the OHEU seeks to alter the prevailing compromise between labour and management as to the degree of protection afforded to OHEU members against employees with more corporate service, but *less* service in that unit. Hence Ontario Hydro's resistance to the union's suggestion. As both parties are deeply committed to their position on this issue, the OHEU may fail to win any change, through no fault of its own. However, there is another way to ensure that the complainants do not fall behind employees who were hired and entered the OHEU unit *after* they did. And the beauty of this solution is that it may be acceptable to both labour and management, because it entails no change to the present accommodation on the more general issue of corporate seniority. Seniority competitions between a complainant and another employee who has *less service*, both in the OHEU unit and with Hydro, could be resolved by applying the same standard – either service in the unit or corporate service to both. (The complainant would win regardless of which of these standards was chosen.) If retroactivity is perceived to be a problem, this new formula could be applied only to contests between a complainant and someone who enters the OHEU unit in the future. The prevailing compromise on the more general issue of corporate seniority would be maintained by continuing to decide seniority contests between a complainant and a person with *more* service in the OHEU unit in favour of

the latter, regardless of their respective dates of hire. This solution was raised by the Board towards the end of the hearing; it apparently had not previously been considered by any of the parties. Although it would solve the problem at hand, it may create other difficulties. A better solution may exist. But Mr. Vincer, speaking for the OHEU, said he was more than willing to meet with the complainants to discuss this and other possible solutions.

IV

29. The complaint has been analysed as an attack on the legality of a collective agreement that does not recognize the complainants' corporate seniority. This interpretation of Article 10.1 accords with the way it has been administered, with only minor variations. But at the hearing, the complainants suggested that Article 10.1 was ambiguous and Ontario Hydro agreed. Conceding that they could not exercise their corporate seniority in the OHEU between 1977 and 1980, they contended that Article 10.1 was ambiguous as to whether or not their full corporate seniority was restored by the removal of the fence in 1980. This argument was clearly the second string in the complainants' bow. Given the parties practice in administering the agreement, this reading has little to commend it. The weight of the complainants' claim to corporate seniority is little enhanced by their assertion of a dubious contractual right. Moreover, none of the aggrieved employees have ever filed a grievance. In result, whether the case is viewed from the perspective of collective bargaining or grievance processing, the interest balance struck by the union does not contravene section 68.

30. The complaint is dismissed.

1564-83-M Paul Tremblay, Steward, Local 350, OPSEU, Applicant, v. The Ontario Public Service Employees Union, Respondent Trade Union, v. **Georgian College of Applied Arts and Technology**, Respondent Employer

Colleges Collective Bargaining Act – Religious Exemption – Union membership in convention adopting pro-abortion resolution – Applicant opposing expenditure of union funds to promote pro-abortion stand – Circumstances within religious exemption provision – But application premature as no funds or time yet spent – Religious objection to some activity of particular union sufficient for exemption

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members W. H. Wightman and B. L. Armstrong.

APPEARANCES: *R. B. Carson and Paul Tremblay for the applicant; Paul J. J. Cavalluzzo, Bram Herlich and Frances Lankin for the respondent trade union; no one for the respondent employer.*

DECISION OF THE BOARD; February 13, 1984

1. This is an application under section 53 of the *Colleges Collective Bargaining Act*

for an exemption from paying certain union dues. The relevant provisions of section 53 provide:

53.-(1) The parties to an agreement may provide for the payment by the employees of dues or contributions to the employee organization.

(2) Where the Ontario Labour Relations Board is satisfied that an employee because of his religious convictions or belief objects to paying dues or contributions to an employee organization, the Ontario Labour Relations Board shall order that the provisions of the agreement pertaining thereto do not apply to such employee and that the employee is not required to pay dues or contributions to the employee organization, provided that amounts equivalent thereto are remitted by the employer to a charitable organization mutually agreed upon by the employee and the employee organization and failing such agreement then to such charitable organization registered as such under Part I of the *Income Tax Act* (Canada) as may be designated by the Ontario Labour Relations Board.

2. The applicant, Paul Tremblay, is a Teaching Master at Georgian College. His application is prompted by the formal position adopted on the issue of abortion by The Ontario Public Service Employees' Union, the trade union which acts as bargaining agent under the *Colleges Collective Bargaining Act* for the staff of the province's community colleges. Mr. Tremblay is a practising member of the Roman Catholic Church, and religion is an important element in his life. He is presently a trustee representing separate school supporters at the secondary level of his local School Board.

3. Mr. Tremblay has long been active in his trade union as well. The style of cause framing his complaint is, of course, his own. He has been a division steward at the College since 1976, and is presently serving a term of stewardship which expires some time in 1984. His concern over the activities of OPSEU began with publication of a report on the abortion issue by Frances Lankin, OPSEU's Equal Opportunities Co-ordinator, in the newsletter which OPSEU publishes for its members. That report set out to explain the "background concerns on the abortion question that makes it an issue for the labour movement". In so doing, it noted that the OPSEU caucus at the Ontario Federation of Labour's annual convention in November '82 had voted in favour of a resolution on abortion which was essentially identical to that passed at the annual convention of the Canadian Labour Congress in May of the same year. The resolution of the Congress read:

WHEREAS it should be the fundamental right of each woman to choose when and if she will bear children; and

WHEREAS present Criminal Code restrictions affect the legality and availability of abortions, and highly organized campaigns are underway to further limit the right to choose; and

WHEREAS two-fifths of the population of Canada lives in communities not served by hospitals eligible to perform abortions; and

WHEREAS there is not a safe and effective method of birth control for each woman;

BE IT RESOLVED THAT the CLC endorses a woman's freedom of choice by supporting the right of women to full access to abortion; and

BE IT FURTHER RESOLVED THAT the CLC demand the removal of abortion from the Criminal Code; and

BE IT FURTHER RESOLVED THAT the CLC demand that free-standing medical clinics providing abortions fully covered by provincial medical plans be established; and

BE IT FURTHER RESOLVED THAT the CLC reaffirm its policy on sex education, family life education and birth control.

Mr. Tremblay, and others who strongly oppose the liberalization of abortion, were very much disturbed at the reported position of the OPSEU caucus, and also at the pro-abortion posture which they felt Ms. Lankin's article had taken. Mr. Tremblay himself, in fact, was upset that OPSEU in its newsletter was dealing with the issue at all. Mr. Tremblay said that, as he was the steward, he accepted the responsibility to act as spokesman for the group, and to communicate their concerns to the head office staff of the union. After a number of telephone calls, Mr. Tremblay wrote directly to the President, Sean O'Flynn, in May of 1983, setting out his group's complaints on the union's activities. Mr. Tremblay subsequently had the opportunity to present these concerns directly to Mr. O'Flynn and other executive officers orally at OPSEU's head office. Mr. O'Flynn's response was that OPSEU itself had not taken a position on the issue, and that the delegates to the OFL convention had voted according to their own conscience. Mr. O'Flynn added that the issue would be discussed at OPSEU's own convention in August, and that Mr. Tremblay would have the opportunity to address the convention himself. With respect to the article in the OPSEU Newsletter, Mr. Tremblay acknowledged in response to the executive officers' arguments that the freedom of speech of Ms. Lankin and other members of the Union justified such articles, so long as the purpose was *educational* only, and a balanced sampling of views was presented. Mr. Tremblay was not satisfied, however, with Mr. O'Flynn's explanation of the OFL convention, or of his view that the issue could properly be raised at OPSEU's own convention, where a *formal* position might be adopted. Mr. Tremblay accordingly laid charges under the union's constitution. These charges were directed specifically at OPSEU's delegates to the OFL convention, but were dismissed as being out of time.

4. From this point, Mr. Tremblay directed his efforts to attempting to stop the abortion issue from being debated as a resolution at the OPSEU convention, which was scheduled for August 26 and 27. He filed with the union on July 29 a challenge to Mr. O'Flynn's interpretation of the union's constitution, on the grounds that from the point of view of members like Mr. Tremblay, abortion was not a "social, political or economic" issue of "common interest" to the members, in the words of the constitution. Rather, as Mr. Tremblay testified, it was "a strong religious issue that I thought the union should stay out of". Mr. Tremblay followed his challenge up with a typewritten brief, which he was permitted to present orally to the OPSEU Executive Board on the eve of the convention. The brief read:

PRESENTATION TO EXECUTIVE BOARD

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

The following presentation is a brief argument against consideration by OPSEU delegates at our Annual Convention of any formal resolutions related to the abortion issue, recognizing such resolutions for voting purposes infringes on the rights and freedoms of individual members and would contradict the union's constitution.

Because of the religious and moral aspects of this matter any decision to support or oppose abortion related activities should rest with each individual. It should not be subjected to a vote for the majority to establish a union position.

At this time I am unaware of the content of any pro or anti-abortion resolutions, so my comments will be related to the O.F.L. resolutions and Frances Lankin's opinions as expressed in the article "The Abortion Debate: Labour's View" in the March/April 1983 issue of OPSEU News.

Reading after the article sub-heading "Moral Arguments", members would probably agree that "at least many ... people who oppose abortion do so for religious reasons." There are strong scientific reasons for this position as well. This can be seen from the comments of a fetologist, Dr. B. Nathanson, in the attached items from "Campaign Life".

However, Ms. Lankin's statement of the basis for this moral stand is inadequate. Throughout most other literature the anti-abortion position is consistently based on the belief that the fetus, the child-in-the-womb, is a distinct, living, human being. This young developing person is part of the continuum of life right from conception through old age.

A religious document arising out of Vatican II states this clearly for Catholics: "For God, the Lord of Life has conferred on men the surpassing ministry of safeguarding life - a ministry which must be fulfilled in a manner which is worthy of man. Therefore from the moment of conception life must be guarded with the greatest care, while abortion and infanticide are unspeakable crimes" (Pastoral Constitution on the Church in the Modern World).

People who profess a religion that recognizes a supreme Being understand that God has created a new human life in the woman's body through her interaction with the child's father. This belief means that the developing person now has rights - including the right to life - which must be recognized and protected by the rest of the community. Such a view is in direct opposition to pro-abortion (pro-choice) statements. They profess a woman's will, instead of God's decision, should determine if the unborn, dependent child will ever have the opportunity of an independent life.

This contrasting perspective can be seen in the initial premise and the O.F.L. resolution:

“Whereas it should be the fundamental right of each woman to choose when and if she will bear children;” and “The O.F.L. endorses a woman’s freedom of choice by supporting the right of women to full access to abortion”.

Those who believe that human choice should allow an adult to destroy a growing young life, even though it is protected and sustained by the woman’s own body, are making a human will supreme. This is Atheism or Humanism with some accompanying religious precepts. However, those who preach it seldom admit that it represents another system of beliefs and morals.

Asking union delegates to vote on the abortion issue is equivalent to asking their support for a religious position. Such an act would be unacceptable according to our Constitution.

Please consider Article 7.1(b) of Membership Rights: “Every member in good standing is entitled: ... to be treated with dignity and respect within the union.” By voting for one side or the other in this debate, delegates are trying to set up a majority which will control union activities. But it is an issue which should be left for individual decision and action because of its religious and moral aspects. The conference must demonstrate respect for all members, because all are covered by the “Canadian Charter of Rights and Freedoms” which states that:

“... Canada is founded upon principles that recognize the supremacy of God ...” and subsequently “... Everyone has the following fundamental freedoms:

a/ freedom of conscience and religion;

b/ freedom of thought, belief, opinion, ...”

As members of institutions in Ontario all delegates should be prepared also to respect other members’ rights under the Ontario Human Rights Code which states in its preamble:

“Whereas recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world ...”

from which follows,

“... public policy in Ontario ... having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and

able to contribute fully to the development and well-being of the community.”

A majority vote for either side on an abortion resolution will inevitably alienate a significant portion of our union community. Some will feel they can no longer participate in actions arising from such a decision. Democracy was not meant to entrench divisions by overriding the individual on issues where a personal decision is appropriate.

In reviewing Article 4.1(c), “The aims and purposes of the union shall be ... to advance the common interests, economic, social and political, of the members and of all public employees wherever possible, by all appropriate means.” It is hard to justify a “common interest” classification for the religious and moral aspects of this problem. There is obvious opposition rights in the items published in OPSEU News.

On this basis, I request that the Executive Board advise the Convention Chairperson that no resolutions are to be entertained on the abortion issue. The subject should be handled as an educational discussion, not as part of the “business of the convention”. (See Article 12.11.7)

Thank you for considering this position.

Paul Tremblay
Steward, Local 350

The Executive Board received Mr. Tremblay’s brief without comment and, as Mr. Tremblay was not a delegate to the convention nor prepared to debate this matter as a resolution, undertook to fill him in after the convention.

5. Resolution 41, the OPSEU resolution dealing with abortion, did get to the floor of the convention in the days that followed. How that happened was explained to the Board by Maxine Jones, an area Vice-President for OPSEU, working at St. Clair College. Ms. Jones was present on the Executive Board when Mr. Tremblay delivered his brief, and also performed the role of chairperson on the Resolutions Committee for the 1983 convention. Ms. Jones explained that all resolutions for the convention must be submitted by the Locals to the Committee 30 days prior to the convention. The committee then has two functions – and only two – apart from identifying matters that ought to have been directed to the constitutional committee. It ensures that the requirements for a quorum were met at the time that the resolution was initially passed by the Local, and it assigns the resolution a priority ranking on the convention list. Once on the list, therefore, only the availability of time will determine whether a resolution actually reaches the floor for discussion at a particular convention. Apart from the question of priority, in other words, the Resolutions Committee is given no power under the OPSEU constitution to “screen” resolutions on the basis of appropriateness. The Resolutions Committee prepares a “first report” several days prior to the convention, listing in order the first group of resolutions which they will be bringing to the floor. The Committee then meets again the day prior to the convention and prepares a “second report”, made up of a back-up group of resolutions to be brought to the floor if time permits.

6. Resolution 41 was not considered appropriate for inclusion in the "first report" of the Resolutions Committee. When the time came to prepare the "second report", the Committee voted 5 to 3 against bringing it forward in that report as well. Once at the convention, however, the list of resolutions in both Committee reports as disposed of, and one of the delegates on the floor moved that Resolution 41 be brought forward for consideration. The Resolution was then referred to the Resolutions Committee, so that it could make its customary recommendation as to whether it felt the members ought to adopt or reject the Resolution. Ms. Jones (a member of Mr. Tremblay's own parish before she moved to Windsor) felt that the issue had too much emotional content for many of the members, and persuaded her Committee to let the Resolution go forward without a recommendation. She testified that she is not aware in her own experience of that ever having been done before.

7. Once on the floor, Resolution 41 continued to encounter procedural roadblocks. Two members immediately moved an objection to the Resolution being considered. That was put to a vote, and the majority voted in favour of *not* considering it. However, under OPSEU's constitution, a motion to block consideration requires a two-thirds' majority, and the vote was only 360 to 205 in favour of stopping it. Resolution 41 was therefore considered. After what Ms. Jones describes as a half-hour of "rational, impressive debate", Resolution 41 was put to a vote, and carried, 294 to 171. As can be seen, significantly fewer delegates chose to vote on the Resolution itself than had participated in the vote not to consider it. The Resolution was in the same form as that adopted by the CLC convention, except that in place of the CLC's last paragraph, Resolution 41 read:

Be it further resolved that the Equal Opportunities co-ordinator prepare a series of three columns for OPSEU News which will explain the problems women face in obtaining a safe, legal abortion; and the reasons why it is important for the trade union movement to take a public stand on this issue.

Mr. Tremblay was advised of the result following the convention, and apart from filing the present application, has filed charges under OPSEU's constitution against Mr. O'Flynn and the rest of the Executive Board, as well as the 1983 convention chairman and the Resolutions Committee, for allowing Resolution 41 to be considered. Those charges are still pending, but raise the issue from a different perspective than the present application.

8. With respect to the present application, Mr. Tremblay concedes that for some, abortion is a social or political issue. But for others, like himself, he feels most strongly that the issue is religious. The value of human life, at *any* stage, he explained, is a fundamental tenet of the teachings of his Church. Advancement of the concept of abortion, in the terms of OPSEU's Resolution 41, cuts, in the view of Mr. Tremblay, at the very roots of his religious beliefs. As his written brief confirmed, he is very much opposed to his trade union dealing with the issue of abortion *at all*, and he has no wish to be drawn into an open debate on something which he considers highly personal to himself. He has, however, been persuaded by the arguments of officers of OPSEU that the "freedoms" of *other* members of the union, including freedom of speech, entitle them to debate the issue of abortion and set forth their views if they wish. From this he is prepared to acknowledge as well the trade union's right to use its newsletter as a forum for discussion, so long as it is only that, and is not used to specifically promote one point of view over another. Acknowledging these freedoms of others, in other words, Mr. Tremblay has been able to reconcile his religious beliefs with everything

except the actual expenditure of funds, to which he himself has contributed, on pro-abortion activities. In drafting his application, therefore, Mr. Tremblay was prepared to limit his claim to an exemption only for that portion of his dues, however minor, which may fairly be attributable to Resolution 41. If that is not possible, Mr. Tremblay indicates that he has no option but to request the Board to grant him a full exemption from the mandatory dues deduction of Article 12 of his collective agreement. It is apparent that Mr. Tremblay does this reluctantly, but he states that the conflict in which he finds the activities of his trade union have placed him with the principles of his religion would leave him no other alternative.

9. The Board's traditional test for the granting of a "religious exemption" under either section 53 of the *Colleges Collective Bargaining Act*, or section 47 of the *Labour Relations Act*, is set out, for example, in the case of *Helen Wybenga*, [1976] OLRB Rep. Aug. 422:

- (a) are the beliefs sincerely held;
- (b) are they religious;
- (c) are they the cause of the objection to paying union dues?

The respondent did not take everyone's time by arguing that Mr. Tremblay is not sincere in his beliefs on abortion, or that, in the case of Mr. Tremblay at least, those beliefs are not "religious". The case before us therefore is this: one way or another, a resolution was adopted by the general membership of the union in convention, authorizing the expenditure of collected dues in a manner that is fundamentally at odds with the religious principles of the applicant, and prompting the present application. The evidence of Frances Lankin as to what has happened to Resolution 41 since its passage is of interest, but before examining that, it is appropriate to consider the grounds upon which the respondent argues that the applicant has not brought himself within the scope of section 53.

10. The respondent argues, firstly, that the Board ought to construe section 53 narrowly, and find that the exemption only exists for those individuals who are opposed to trade unionism in general. The respondent has candidly placed the earlier decision of *Klaas Stel*, [1971] OLRB Rep. July 363, before the Board, but argues that the Board should depart from the contrary conclusions arrived at in *Stel*, and the cases that have followed it, and that it should prefer the approach taken by the British Columbia Labour Relations Board, as evidenced, for example, in that Board's decision in *Cliff Straub*, (1976) 1 Can. LRBR 261.

11. Apart from an examination of the precise language of section 47 of the *Labour Relations Act* (which does in fact differ from that of section 53 of the *Colleges Collective Bargaining Act*), the Board expressed its conclusions in *Stel* in the following terms:

- 17. Section 35a [now 47], in the limited circumstances set out in subsection 2, appears to us to be designed to give job security to those employees whose religious convictions or beliefs come into conflict with the union security provisions of a collective agreement. To construe the section to mean that job security is only open to employees who object to joining all trade unions because of their religious convictions or beliefs and not to an employee who objects, on the same grounds, to joining a particular trade union would not appear to be in accord with "such fair,

large and liberal construction and interpretation” as those words are used in section 10 of The Interpretation Act. Particularly is this so when, as we found above, the section is open to the construction contended for by the applicant and, further, when there is nothing either in the section itself or, when viewed in relation to other sections of the Act, which would compel us to the other point of view.

Stel has been the law in Ontario for more than 12 years, and nothing in the choice of words of the Legislature in section 53 of the *Colleges Collective Bargaining Act* leads us to a different conclusion on the meaning of that section. Once again, the section reads:

53.-(1) The parties to an agreement may provide for the payment by the employees of dues or contributions to the employee organization.

(2) Where the Ontario Labour Relations Board is satisfied that an employee because of his religious convictions or belief objects to paying dues or contributions to an employee organization, the Ontario Labour Relations Board shall order that the provisions of the agreement pertaining thereto do not apply to such employee and that the employee is not required to pay dues or contributions to the employee organization, provided that amounts equivalent thereto are remitted by the employer to a charitable organization mutually agreed upon by the employee and the employee organization and failing such agreement then to such charitable organization registered as such under Part I of the *Income Tax Act* (Canada) as may be designated by the Ontario Labour Relations Board.

(3) No agreement shall contain a provision which would require, as a condition of employment, membership in the employee organization.

While the Legislature could have (and probably should have) used the word “the” before “employee organization” in subsection 2, as it did in subsection 1, since only one trade union is designated as the bargaining agent for all employees under the *Colleges Collective Bargaining Act*, we think the use of “an” is more likely a result of following the language already contained in section 47 of the *Labour Relations Act*, than of a conscious attempt to depart from the latter’s well-established meaning. We can see no compelling reason why the Legislature, under either Act, would, as a matter of logic, insist that an employee demonstrate to the Board an irreconcilable conflict that goes any further than the trade union with whom (because of the collective agreement requirements) he has a problem. To the extent that the employee is being “selective” in his views, the exemption is only a “religious” one, and the employee’s credibility is always a matter upon which the Board must satisfy itself. The British Columbia case cited to us, on the other hand, appears to rest its conclusion on an analogy with “conscientious objectors” to the military draft in the United States. Even assuming that that is an appropriate parallel to the issue before us, the British Columbia decision forms its conclusion without any examination of the foundation for “conscientious-objector” exemptions in that country, or any judicial decisions thereon, and is not by itself compelling.

12. The respondent moves from there to a number of arguments on “remoteness”. It points, firstly, to the decision of the Board in *Adams Mine*, [1982] OLRB Rep. Dec. 1767,

in which the Board noted that, for a trade union's activities to be accorded the specific protection of the *Labour Relations Act*, those activities must be more than just "legitimate" or lawful: they must also not be "too remotely connected to the dominant purpose of the Act" [i.e., collective bargaining with employers]. The respondent points out that the conduct complained of by the applicant does in fact go beyond "the dominant purpose of the Act". From there it argues that, since the Board has said that the trade union with respect to this activity will not be entitled to the protections of the Act, it ought not to be held vulnerable to an application for dues exemption under the provisions of the Act either. The Board does not find this argument compelling. It is one thing for the Board to find that a trade union, by its own act, can take itself temporarily outside the protection of the *Labour Relations Act*; it is quite another for *the trade union* to argue that an individual, because what the trade union has done exceeds the scope of its ordinary mandate, ought to be denied relief from the religious conflict which the trade union itself has caused him. Indeed, the fact that the present activity lies outside the "dominant purpose" for which the trade union has been formed (and dues deducted) was precisely Mr. Tremblay's *point*, when he initially launched his challenge under the respondent's constitution. As in *Adams Mine, supra*, the Board does not suggest that the adoption by a trade union of positions on timely social or political issues offends any general law of the province, and we recognize that the pressure to do so may be very strong. Whether it is appropriate or not to adopt a stand on such issues will generally be a matter for the trade union itself to pass judgment on. But in making that judgment, the trade union can also be expected to take into account the downside risks which inhere in that form of activity. One risk obvious to any trade union is the potential for divisiveness and alienation within the membership, as a greater or lesser proportion of the members may find themselves in disagreement with the stand that "their trade union" has adopted. But there are other risks continually present as well, and one of these, at least under the wording of the *Colleges Collective Bargaining Act*, is the express accommodation granted under section 53 on the basis of religious belief. If, in light of current activities, that section is to be written out of the Act, it appears to us appropriate that that be done through a process other than administrative interpretation.

13. The respondent also relies on the recent decision of the Board in *Humber College, re Jacob Emmanuel Schochet*, [1983] OLRB Rep. Sept. 1472. But there the applicant, also a member of OPSEU employed at a community college, was complaining about a resolution (concerning the State of Israel and the Palestine Liberation Organization) adopted at the annual convention of the Ontario Federation of Labour. All that the applicant could say about OPSEU was that it had had delegates at the convention, and that it had not specifically denounced the resolution subsequent to the convention. (The Board in that latter regard observed that the resolution essentially died its own death when it was rejected by the Canadian Labour Congress shortly thereafter.) Apart from any other problems with that application, the Board in *Schochet* concluded that the applicant's objections were "entirely too remote in relation to the respondent trade union" to support the application. But that case, on the point of OPSEU's involvement, stands in such stark contrast with the present as to be almost supportive of Mr. Tremblay's application. And unlike the case of Dr. Schochet, Mr. Tremblay is not seeking in any way to mobilize trade union support for the opposite point of view: he does not want his trade union to deal with the question of abortion *at all*.

14. A further argument of the respondent on remoteness focusses on the applicant's request that, if possible, only that portion of his dues allocable to the abortion activities be exempted. The respondent argues that an individual member cannot pick and choose amongst

the trade union's policies: he either rejects the trade union or he does not. The respondent submits that the fact that Mr. Tremblay is willing to stay within the trade union and continue to be active, if only he can be granted a nominal exemption of his dues, undermines the legitimacy or credibility of his application.

15. Mr. Tremblay's counsel clearly contemplated this line of attack when he observed that the present application's biggest strength is also its biggest weakness. Had the applicant not tried to reduce his claim on a rational basis to specifically that which offended him, he would not have had to face this kind of a challenge. He could, in other words, have simplified his case simply by asking for a total exemption. But, as counsel points out, the fact that he has not done so also underscores the sincerity of his position. Mr. Tremblay's attempt to reach a fair accommodation removes any skepticism that he could be an individual seeking to use his religious beliefs as an excuse to divert his support from a trade union that he simply does not like. Rather, it is apparent that Mr. Tremblay is an individual with a strong belief in both the teachings of his Church *and* the work of his trade union, earnestly searching for a way to reconcile the two. There is nothing in the section, or the Board's jurisprudence, to suggest that an applicant's objections must extend to *all* activities of the trade union. If the conflict with the applicant's religious principles is in fact confined to one specific area of the trade union's activities (and a peripheral area at that), the Board has difficulty finding that the fact that the applicant would be content with no more of an exemption than is necessary to eliminate the conflict should lead the Board to dismiss his application. Indeed, the Board cannot help but note how closely Mr. Tremblay's approach to apportionment in relation to this peripheral trade union activity parallels the practice which we are aware has been adopted in both Great Britain and the United States, with respect to activities of a comparable nature, (*Trade Union Act*, 1913 (2 & 3 Geo. 5 c.30, s.3); *International Association of Machinists v. Street*, (1961) 48 LRRM 2345 (U.S.S.C.); *Brotherhood of Railway and Steamship Clerks v. Allen*, (1963) 53 LRRM 2128 (U.S.S.C.); *Abood v. Detroit Board of Education*, (1977) 95 LRRM 2411 (U.S.S.C.)). All that the applicant's position demonstrates is that the focus of his conflict is a narrow one. But if that conflict is as irreconcilable and as fundamental to the applicant's religious beliefs as we find to be the case here, we find no basis for concluding that the applicant's predicament does not fall squarely within that class of cases for which the exemption has been made available.

16. On the basis of the findings of fact we have made, therefore, we do not find that Mr. Tremblay's willingness to accept apportionment undermines his application in any way. Given the actual language of section 53, however, it may be that the only order that the Board could make in the event we do find an irreconcilable religious conflict to exist, would be that "the provisions of the agreement ... do not apply". In that event, it would, of course, remain open to the trade union and the applicant to work out some *voluntary* arrangement on apportionment that would satisfy the applicant, as in fact has been the approach favoured by the Supreme Court of the United States in the comparable circumstances referred to *supra*.

17. This brings us finally to the *Charter of Rights* argument, developed briefly by the respondent in defence of the application. The issue is the extent to which freedoms guaranteed under the Charter, such as the freedom of speech, association and religion, of trade union members different in interest from Mr. Tremblay, may impose limitations on the way section 53 can be given effect to; or, put differently, the balance to be struck by adjudicators amongst these potentially-competing freedoms themselves. Of the various elements of the *Charter* referred to, it is the respondent's argument on the freedom of speech of the trade union and

its constituent members which causes us the most concern. Mr. Tremblay has, however, conceded that accommodation of the freedom of speech of other members of the union ought to permit those members to express themselves in the manner they wish, and he has effectively dropped his complaints in that regard. Even the publication of articles in the OPSEU Newsletter, he ultimately conceded, could not be cause for complaint, so long as they essentially endeavour to present a *balanced* sampling of opinions, and thus are written solely from an educational point of view. Mr. Tremblay's complaint, therefore, has been reduced to the specific expenditure of funds, to which he has contributed through his dues, for purposes fundamentally inconsistent with his religious beliefs.

18. What *are* the expenditures about which Mr. Tremblay has expressed concern? He points, firstly, to the costs of the annual convention attributable to debate on the "abortion" resolution. But that debate, it seems to us, would fall within the "freedom of speech" area already conceded by the applicant, notwithstanding that that debate fell within the "business" portion of the convention. His complaint, therefore, must be with the adoption of the Resolution itself. And it is only the final paragraph of that Resolution to which Mr. Tremblay, for the purposes of his request for apportionment, has ultimately taken exception: it is only that paragraph which can be said to contemplate an actual expenditure of funds, and which therefore crosses the line that Mr. Tremblay, after struggling to reconcile the freedoms of others with his own, has drawn in his mind. And that is what makes of significance the evidence of the respondent, through Ms. Lankin, as to the present status of the articles authorized to be written. It is the evidence of Ms. Lankin (and we accept that evidence) that neither time nor funds have yet been expended on the proposed articles, because she and the persons to whom she reports at OPSEU have not yet decided what format these articles will take, or how the various views on the subject are to be presented. In light of this, it cannot fairly be said that the line which Mr. Tremblay himself has drawn has yet been crossed.

19. It follows, therefore, that the specific application before us is premature, and must be dismissed, without prejudice, obviously, to Mr. Tremblay's right to re-file should further developments warrant.

20. The application is dismissed.

0242-83-U Renee Guerin, et al, Complainants, v. Canadian Union of Public Employees, Local 1967, Canadian Union of Public Employees, Local 2474, and **The Hawkesbury & District General Hospital**, Respondents, v. Canadian Union of Public Employees, Intervener, v. Nicole Drouin and certain other employees, Interveners

Remedies – Settlement – Unfair Labour Practice – Merger of hospitals through purchase creating dispute as to seniority – Resulting unfair representation complaint settled – Settlement calling for membership meetings at which union will recommend dove-tailing followed by vote – Union officials having additional secret meetings to urge opposition to dove-tailing breach of settlement – Two Board Members in majority setting aside vote results and deeming vote in favour of dove-tailing

BEFORE: Ian C. Springate, Vice-Chairman, and Board Members L. Hemsworth and W. F. Rutherford.

APPEARANCES: *John B. West and James R. Hendry for the complainants; Mario Hikl, Robert Rouleau and Gilles Lebel for the Canadian Union of Public Employees and its Locals 1967 and 2474; Jacques A. Emond for Nicole Drouin and certain other employees; no one appeared on behalf of the Hawkesbury & District General Hospital.*

DECISION OF IAN C. SPRINGATE, VICE-CHAIRMAN: February 20, 1984

1. A French language version of this decision will be issued shortly.
2. I note the consent of the parties to the substitution of Board Member W. F. Rutherford for Board Member B. K. Lee part-way through the proceedings.
3. The members of this panel of the Board are unanimous in our view of the facts relevant to this case. We are also unanimous in concluding that the *Labour Relations Act* has been violated. We differ, however, with respect to the appropriate remedy for the breach. My colleagues favour a remedy other than the one which I view as appropriate. Accordingly, on the issue of remedy, this decision reflects a minority opinion only.
4. This matter arises out of a complaint under section 89 of the *Labour Relations Act* alleging that the respondents have violated section 89(7) of the Act by not complying with the written terms of settlement of an earlier section 89 complaint.
5. Section 89(7) provides as follows:

“Where the matter complained of (in a section 89 complaint) has been settled, whether through the endeavours of the labour relations officer or otherwise, and the terms of the settlement have been put in writing and signed by the parties or their representatives, the settlement is binding upon the parties, the trade union, council of trade unions, employer, employers’ organization, person or employee who have agreed to the settlement and shall be complied with according to its terms, and a

complaint that the trade union, council of trade unions, employer, employers' organization, person or employee who has agreed to the settlement has not complied with the terms of the settlement shall be deemed to be a complaint under subsection (1)."

6. These proceedings have their origin in the re-organization of hospital services in the Town of Hawkesbury. Prior to July of 1981 there were two hospitals in the town, namely, the Hawkesbury General Hospital and the smaller Smith Clinic. Notwithstanding its name, the Smith Clinic functioned as a general hospital, and as did the Hawkesbury General Hospital it offered a wide range of services to the general public in the Hawkesbury area. The General Hospital was a public hospital managed by an elected board, whereas the Smith Clinic was privately owned by a group of physicians. Because both the General Hospital and the Smith Clinic were housed in older buildings, neither of which was suitable for major renovation, the Ontario Ministry of Health indicated a willingness to financially support the construction of a new hospital building. The Ministry made it clear, however, that once a new hospital became operational, the Ministry would not continue to fund any other hospital in the Hawkesbury area. In light of these developments, the owners of Smith Clinic indicated to the Ministry of Health that they were willing to sell their hospital. Eventually a sale price of some 1.3 million dollars was arrived at in discussions between the owners of Smith Clinic and the Ministry. Although the Ministry put up the money for the purchase of the Smith Clinic, the Government did not act as the purchaser. Instead, the Ministry of Health gave the money to the Hawkesbury General Hospital which in turn used it to purchase the Smith Clinic. As of July 31, 1981 the Smith Clinic became the Smith Pavilion of the General Hospital.

7. Prior to the events described above, some 110 employees at the General Hospital had been represented by Canadian Union of Public Employees, Local 1967. In January of 1981 the Canadian Union of Public Employees was certified as the bargaining agent for two bargaining units with a total of approximately 65 employees at the Smith Clinic, and Local 2474 was chartered to be their local. Although it appears that notice to bargain was served on the Smith Clinic by Local 2474, no collective agreement was ever entered into between the local and the Clinic, presumably because of the impending sale. On July 30, 1981, one day prior to the formal takeover of the Smith Clinic by the General Hospital, representatives of Local 2474 (the Smith Clinic local) signed agreements with the General Hospital with respect to the Smith Clinic employees. These agreements provided for the continued employment of the Smith Clinic employees by the General Hospital, as well as a limited recognition of employee service at the Smith Clinic. However, the agreements effectively put the Smith employees at the bottom of the General Hospital employee seniority lists for the purposes of promotions, lay-offs and shift scheduling. Mrs. L. Whetstone, a Smith Clinic employee who signed one of the July 30, 1981 agreements on behalf of Local 2474, testified that the local's representatives had signed the agreements only because the General Hospital had threatened that if they did not do so, the Hospital might refuse to continue to employ the Smith Clinic employees. Local 1967, which represented the General Hospital employees, apparently had no input into the terms of these agreements. Indeed, members of the executive of Local 1967 testified that they had no knowledge of what had led up to the signing of the July 30, 1981 agreements.

8. Their placement at the bottom of the seniority lists caused considerable concern to the Smith Clinic employees. Staff turnover at the Clinic had been fairly low, with the result that a number of employees had 15 or more years of service. Further, a number of employees

were of the impression that the General Hospital was already over-staffed, and they were concerned that once operations became consolidated in a new hospital building substantial lay-offs might occur. This was not, however, the only area of concern for the Smith Clinic employees. The effects of the sale on the Smith Clinic employees was one of the topics dealt with in a special study performed for the Hawkesbury General Hospital by Mr. C. Wilson of the Ontario Hospital Association and Mr. M. Lalonde of the Ottawa General Hospital. In their report Mr. Wilson and Mr. Lalonde had the following to say about the consequences of the sale on the Smith Clinic employees:

“Consequences of the Sale for former with Employees.

In the whole equation of purchase and sale, it is the former employees of the Smith Clinic who appear to have paid the price. Whatever anyone else has won, almost without exception, they have lost. Among their losses are:

1. *Union Seniority*: The effect of this has been to disadvantage them in all matters of shift, vacation, statutory holidays and promotions or appointments.
2. *Ward Teams and Nursing Specialties*: On purchase, RNs, RNAs, aides and orderlies were shifted on to new units, with new teams and often to new specialties from the OR to medicine, from obstetrics to nursery.
3. *Special Status*: With the knowledge of the Ministry of Health, the administration of the Smith Clinic had granted some 10 RNAs authority to act as (and be paid as) RNs. These “RNA Specials” were reduced to RNAs immediately on purchase. Although they accepted compensation for the change in their status, the former “RNA Specials” still resent the apparent ‘demotion’ regardless of the explanation offered.
4. *Permanent Shifts*: Particularly grievous for former Smith employees is the Hospital’s scheduling of *permanent shifts* for RNAs. Under this system employees are assigned permanently to a shift (Days, Evenings or Nights) according to seniority. This system, it appears, is the rule in Quebec hospitals. It is encountered *very rarely* in Ontario and the Hospital was strenuously advised by its labour relations consultants *not* to adopt it in 1981. Its normal disadvantages, (which have caused some hospitals to take their unions to arbitration to get it *out* of the contract) are multiplied when permanent shifts are employed in a situation of unfair seniority – such as that now suffered by the Hospital. There are present examples of RNAs with 14, 12 and 8 years seniority (at the Smith only) now forced to work permanent nights, without prospect of a better shift for 2-4 years. For the employee’s family this is a particularly high price to pay.
5. *Normal Avenues of Appeal or Redress*: Former Smith employees perceive, correctly in the Consultants’ view, that they have had nowhere to turn when they felt that they had been wronged. Their Union is dominated

by long tenured Hospital employees who have profited significantly from the influx of new (i.e. Smith) employees below them on the seniority list. In consequence it has done little to support their claims. Administration, which still talks about "our people" in contrast to "them" is notably unsympathetic. It has seen "them" simply as individuals who persist in resisting the new realities of their employment.

Finding #7: Former employees of the Smith Clinic have sustained considerable losses in their conditions of work and in their relationships with fellow employees and their employer. The Hospital's administration has not seen it to be its responsibility to recognize or resolve what the consultants see to be unfair consequences of the amalgamation."

9. On March 31, 1983 eighteen of the former Smith Clinic employees filed a complaint under section 89 of the *Labour Relations Act* against Local 1967, Local 2474 and the General Hospital. The complaint alleged that in agreeing to put the Smith employees at the bottom of the seniority lists, the union locals had violated section 68 of the Act. Section 68 provides that a trade union cannot act in a manner that is arbitrary, discriminatory or in bad faith in representing an employee in a bargaining unit. The complaint also alleged that the General Hospital had violated sections 64 and 79 of the Act. Section 64 prohibits an employer from interfering in the formation, selection or administration of a trade union or the representation of employees by a trade union. Section 79 "freezes" the terms and conditions of employment pending negotiations for a collective agreement.

10. The original March 31, 1983 complaint was settled in writing between the parties, and accordingly, the Board was not called upon to make any findings as to its merits. The allegation in the instant complaint is that the earlier settlement has been violated. Having regard to the wording of section 89(7), the only issue in these proceedings is whether the settlement has been violated, and not whether the initial complaint would have been successful. The complainants in the instant proceedings are the same former Smith Clinic employees who filed the first complaint. Although the General Hospital was named as a respondent in these proceedings, it did not participate in the hearing, presumably because it was not alleged that it had violated the terms of the settlement. The two union locals were represented at the hearing by Mr. Mario Hiki, the National Director of Legal Services for the Canadian Union of Public Employees. Given that the complaint alleged that Mr. Robert Rouleau, a national representative with the union, had breached the terms of settlement, Mr. Hiki indicated that he was also appearing on behalf of the national union. Accordingly, the Canadian Union of Public Employees was formally added as an intervener in the proceedings. A large number of General Hospital employees were also represented at the hearing by counsel. Given the particular facts of this case, and given that these employees might be directly affected by any decision of the Board, over the objections of the complainants these employees were also accorded standing as interveners.

11. The settlement to the original complaint flowed from a meeting in Ottawa on April 14, 1983 between representatives of the complainants, John McLaughlin, the executive administrator of the General Hospital, and certain national representatives of the Canadian Union of Public Employees. Also in attendance was one of the Board's Labour Relations Officers. At the meeting the following Minutes of Settlement were entered into:

“MINUTES OF SETTLEMENT

In the above matter, the parties hereby agree to resolve their differences in the following manner:

1. Notwithstanding any subsequent provisions contained herein, the Respondents jointly and individually deny each and every allegation within the subject Complaint and further deny any and all liability related thereto.

2. The parties hereby agree to review the matter of the seniority lists covering the Complainants and others through direct discussion and negotiation in good faith with the object of reaching agreement on an integrated seniority lists. The Respondent Trade Union Committee in this matter shall include Ms. Louise Whetstone, Alexis Lessard and Marie Therese Fraser. The parties jointly request the attendance of the Board's Senior Labour Relations Officer at this meeting.

3. The Complainants and the Respondents Trade Unions further agree that *in the event the discussions provided for in paragraph 2 above result in a proposed integrated seniority list, then such list shall be submitted to the Local Union 1967 membership for ratification by secret ballot vote at a membership meeting called for such purposes. The National Representatives, signatory to these Minutes of Settlement hereby agree to wholeheartedly recommend the principle of an integrated seniority list to the membership.* The Complainants and the Respondent Trade Union request the attendance of the Board's Senior Labour Relations Officer at such a meeting to observe.

4. The Complainants and the Respondent Trade Unions agree to be bound by the decision of the membership reached by the procedure outlined in paragraph 2 and paragraph 3 above.

5. The Respondent Trade Unions hereby undertake to conduct future membership meetings in a manner that will afford members on shift work the opportunity to attend. In this regard, membership meetings will be held during both the afternoon and the evening on each “meeting day” allowing two membership meetings. Such arrangements shall continue for a minimum of six (6) monthly meetings or until such time as Local Union By-Laws are adopted and make other provisions. The continuation of the “two” membership meetings shall be determined by the attendance of members at such meetings. Pending the adoption of Local Union By-Laws, the membership meetings shall be conducted in a parliamentary manner in accordance with Bourignot's Rules of Order.

6. The Respondent Employer and the Respondent Trade Union hereby agree to discuss the matter of the “permanent” shift process against the “rotating” shift process.

The parties to this agreement hereby undertake to fulfill the provisions of this agreement in keeping with its spirit and intent.

7. In view of these Minutes of Settlement, the Complainants hereby request leave of the Board to withdraw their Complaint (Board File No. 2753-82-U) and further undertake that the circumstances shall not be used to form the basis for any further Complaint under the Act."

DATED at Ottawa, this 14th day of April, 1983.

For the Complainants

"Eunice Zorosz"
 "Alexis Lessard"
 "Dianne Laflamme"
 "Denis Myrs"
 "Joyce Butler"
 "Louise Whetstone"

"John B. West"
 Counsel for the
 Complainants

"James R. Hendry"
 Counsel for the
 Complainants"

For the Respondents

"Giles Lebel"
 "Helen O'Regan"
 "Steve Backs"
 "Robert Rouleau"

"John G. McLaughlin"
 Respondent Employer

(emphasis added)

12. The April 14, 1983 Minutes of Settlement contemplated a further meeting at which an attempt would be made to reach agreement on integrated seniority lists, and that three of the complainants, namely, Louise Whetstone, Alexis Lessard and Marie Therese Fraser would be in attendance at the meeting. Once integrated seniority lists had been drawn up, the lists were to be put to the membership of Local 1967 for ratification. By now the membership of Local 1967 included both the General Hospital and former Smith Clinic employees. The Minutes of Settlement also stipulated that prior to the vote, the national representatives of the Canadian Union of Public Employees who had signed the Minutes of Settlement were to "wholeheartedly" recommend the principle of integrated seniority lists to the local's membership. At some point, it became understood that the recommendation would actually be made by only two of the four union's representatives who had signed the Minutes of Settlement, namely Mr. Robert Rouleau and Mr. Gilles Lebel. Mr. Rouleau is a national representative of the union responsible for servicing a number of locals in the Ottawa - Hawkesbury area, including Local 1967. Mr. Lebel is an assistant director of the Canadian Union of Public Employees. Mr. Lebel is based in Sudbury and prior to the events in question had not met with members of Local 1967. At the time of the signing of the April 14, 1983 Minutes of Settlement, all of the individuals concerned recognized that the former Smith Clinic employees were a minority in the local, and that for integrated seniority to be accepted a number of the General Hospital employees would have to vote in favour of it, notwithstanding that to do so

would run counter to the interests of many of them. Ms. Joyce Butler and Mrs. Louise Whetstone, two of the complainants who signed the April 14, 1983 Minutes of Settlement, testified that at the time the agreement was entered into they felt that if the Smith employees were given a fair chance to have their position explained, then the General Hospital employees would likely see the justice of their position.

13. All of the members of the executive of Local 1967 had been employees of the General Hospital prior to the purchase of the Smith Clinic. None of the members of the executive were in attendance at the meeting in Ottawa on April 14, 1983. Accordingly, no one on the executive signed the Minutes of Settlement. In addition, neither the executive nor the membership of the local had given the national officers of the union authority to sign the document on behalf of the local. On April 16, 1983, Mr. Rouleau met with the executive of Local 1967. Mr. Rouleau outlined to the executive what had happened on April 14th, 1983 and explained the terms of the Minutes of Settlement. A committee of three General Hospital employees was then selected to deal with the integrated seniority issue. Included on the committee were Miss Savaria, the president of Local 1967, as well as Francine Radford another member of the local's executive. Mrs. Nicole Drouin, a union steward who was not on the executive, was chosen as the third member of the committee. Another meeting of the Local 1967 executive, this time with Mrs. Drouin in attendance, was held on April 19, 1983 at a local motel. Both Mr. Rouleau and Mr. Lebel were also in attendance. At this meeting, the executive of the local voiced strong opposition to the Minutes of Settlement and further indicated that since they had not been involved in negotiating the settlement, they did not view themselves as bound by it. Mr. Lebel tried to convince the members of the executive to go along with the settlement, but without any noticeable success. This meeting ended with Mr. Lebel and Mr. Rouleau indicating that the three representatives of the General Hospital employees should at least attend a meeting set for the following day with representatives of the complainants and the Hospital.

14. The meeting on April 20, 1983 was convened at the Hospital. In attendance was Mr. John G. McLaughlin, the executive administrator of the Hospital, as well as certain other management persons. Also present was the committee comprised of three former Smith Clinic employees, namely, Marie Therese Fraser, Alexis Lessard and Louise Whetstone, as well as the committee of three General Hospital employees, namely, Yolande Savaria, Francine Radford and Nicole Drouin. Mr. Rouleau and Mr. Lebel were also in attendance.

15. The meeting on April 20th commenced with a discussion relating to the claim by the three General Hospital employees that they were not bound by the April 14th Minutes of Settlement. Mr. Rouleau then asked for an adjournment so he could meet with these three employees. In these proceedings, Mr. Rouleau testified that he had felt that if he could talk to the employees, he could convince them to go ahead with the terms of the Minutes of Settlement. He also testified that he felt he had an obligation to talk to the General Hospital employees in that he had signed the Minutes of Settlement on their behalf.

16. Mr. Rouleau's meeting with the three General Hospital employees lasted for at least one and a half hours. Mr. Rouleau testified that he stated to the employees that if the local's membership felt as strongly as they did about integrated seniority, the idea would be rejected. It was Mr. Rouleau's evidence that given the relative numbers involved, he had been of the view that integrated seniority would likely be rejected in a vote. Mrs. Nicole Drouin testified that the three employees discussed among themselves the numbers involved and they concluded that a vote would be against integrated seniority. Eventually the three employees agreed

to the vote, but on two conditions. One was that the ballot be simple and easy to understand. The second condition related to the timing of the vote. Previously, April 27, 1983 had been suggested as a possible date for the vote. The three General Hospital employees insisted that any vote be held subsequent to that date.

17. During the course of the discussions between Mr. Rouleau and the three General Hospital employees, one of the employees asked if they would be able to hold informal meetings prior to the vote. Mr. Rouleau indicated that such meetings could be held, and in this regard specifically referred to possible wine and cheese parties. Mr. Rouleau cautioned, however, that no union meetings were to be held.

18. After the three General Hospital employees and Mr. Rouleau had returned to the larger meeting, it was agreed that a secret vote would be held on May 4, 1983. It was also agreed that there would be two membership meetings on May 3, 1983 at which Mr. Rouleau and Mr. Lebel would speak in favour of integrated seniority. Mrs. Whetstone, one of the Smith employees, was not contradicted when she testified that she proposed that no other large meetings be held, and that no one spoke against the proposal. There was then some discussion about campaigning for the vote. The matter was left with the understanding that canvassing would be permitted. Particular reference was made to canvassing "one on one" or "one on two or three". It was agreed that neither the name of the union or any union money would be used in this canvassing. Unfortunately, at the larger gathering no one mentioned Mr. Rouleau's earlier comment to the three General Hospital employees about holding wine and cheese parties, and hence, the former Smith employees were not aware that the comment had been made.

19. During the course of the April 20, 1983 meeting, Mr. McLaughlin distributed copies of proposed integrated seniority lists which the Hospital had prepared. These lists were accepted by all concerned as being generally correct, but it was agreed that if integrated seniority were to be adopted, then individual employees would be given an opportunity to challenge their position on the lists. After this had been agreed to, Mr. McLaughlin requested that the matter be kept out of the press. This request was agreed to. Later, when the meeting was breaking up, Mr. Rouleau reminded the three General Hospital employees that they should not go to the press. He also mentioned to the same employees that he had already been contacted by a reporter. Given what subsequently occurred, it is unfortunate that Mr. Rouleau did not also advise the three former Smith Clinic employees of this fact.

20. At the meeting on April 20, 1983, a second set of Minutes of Settlement were entered into which provided as follows:

"MINUTES OF SETTLEMENT"

1. Further to the April 14, 1983, Minutes of Settlement in the above matter the parties hereby agree to conduct membership meetings on May 3, 1983 and a secret-ballot vote May 4, 1983 at the Legion Hall, Hawkesbury at the following times:

Membership Meetings – May 3, 1983 – 2:00 p.m. and 7:00 p.m.

2. Further, in the event the membership by the secret ballot vote ratify the proposed integrated seniority list (subject to individual review) the parties agree this settlement shall constitute an amendment to the Collective Agreement under Article 25.02 and the provisions of Article 11.02 shall apply to the question of errors that may appear on the proposed seniority list.

3. The parties agree to establish a Committee of three (3) union members to resolve any errors appearing on the proposed seniority lists.

DATED at Hawkesbury this 20th day of April, 1983.

("John McLaughlin")

("Louise Whetstone")

("Francine Radford")

("Alexis Lessard")

("Yolande Savaria")

("Bob Rouleau")

("Gilles LeBel")

("N. Drouin")

21. It will be noted that the second set of Minutes were stated to be in furtherance to the April 14, 1983 Minutes of Settlement, and essentially dealt with how the first Minutes of Settlement were to be implemented. The second Minutes of Settlement were signed by, amongst others, Francine Radford, an executive member of Local 1967, as well as Yolande Savaria, the local's president. We are satisfied that by the action of Miss Savaria and Mrs. Radford signing the Minutes of April 20, 1983, they thereby adopted the Minutes of April 14, 1983 on behalf of Local 1967, and the local became bound to its terms.

22. The same day that the second Minutes of Settlement were signed, the Vankleek Hill Review published a front page article dealing with the status of the former Smith Clinic employees. Vankleek Hill is a town within the area serviced by the Hawkesbury General Hospital. On the previous day, April 19, 1983, Mr. Rouleau had been telephoned by a reporter from the Review and asked a number of questions about the situation involving the Smith Clinic employees, and his responses were incorporated into the article. The appearance of the article upset a number of former Smith Clinic employees due to the oral understanding to keep the matter out of the press. However, given that Mr. Rouleau had spoken to the reporter the day prior to when the understanding had been reached, he had not in fact breached the oral understanding. Certain of the former Smith Clinic employees were very upset at the contents of the newspaper article. What was of particular concern to the former Smith Clinic employees was the following statement contained in the article:

"The former (Smith) employees accepted cash settlements from the General Hospital in the takeover to accept a loss of seniority. The employees were told if they did not sign such an agreement they would not be hired by the Hawkesbury and District General Hospital.

RNA specials, RNA's responsible for more work than RNA's by Ministry standards were subsequently paid the salaries of RNA's and not the higher amount rewarded them by the privately-owned Smith Clinic.

Whether it was legal or not it was signed said Rouleau of the agreement all Smith Clinic employees signed to work at the Hawkesbury and District General Hospital."

23. There is no question that the statement contained in the article about the Smith Clinic employees accepting cash settlements to accept a loss of seniority was inaccurate. As indicated above, only the relatively small number of "RNA specials" received a cash payment, and the payment was not to compensate them for their loss of seniority, but only to compensate them for a downward change in their status and pay. Other Smith employees received no similar payments. In testifying before this Board, Mr. Rouleau asserted that while he had discussed both the seniority issue and the cash payments with the reporter, he had not told the reporter that the Smith employees had received compensation for the loss of their seniority. Given this evidence, which was not contradicted, it appears that it was the reporter who incorrectly linked the monetary payments to the loss of seniority, and not Mr. Rouleau. However, given the way the article was written, at least some of the Smith employees felt that Mr. Rouleau was to blame for the erroneous information.

24. A former Smith Clinic employee who was particularly upset by the article in the Review was one of the complainants, Ms. Joyce Butler, a resident of Vankleek Hill. Although an RNA, Ms. Butler had not been an RNA special and hence had not received any cash payment from the hospital. Ms. Butler wrote an identically worded letter to both the Vankleek Hill Review and the Hawkesbury Express. Ms. Butler testified that she had known about the oral understanding not to go to the press, but that she had decided to write the letters anyway because she was so upset that Mr. Rouleau had, in her way of thinking, publicly stated that the Smith employees had been paid to give up their seniority. The letter, which both newspapers printed unedited on or about April 30, 1983, read as follows:

"The Editor,

As one of the 18 former Smith Clinic employees who was involved in filing a complaint with the Labour Relations Board against CUPE and the General Hospital, I feel I can inform the public honestly about the events surrounding this issue. We filed the complaint for the main reason of regaining our seniority rights which were lost at the time of the takeover in 1981. We also felt we were not being given fair representation by our union representatives, neither at the time of the takeover, nor up until the time of filing the complaint.

Due to a certain amount of bad press, malicious gossip, and ignorance of the truth, I don't feel most people understand the issue fully. We simply want what is rightfully ours; recognition of our years worked at Smith Clinic. We were certainly never paid one cent to give this up. We were, however, told by our present employers, at that time, that if we did not sign an agreement to give up our seniority, we would all be fired. Frankly, we were not left much choice.

I would hope that everyone voting on the integrated seniority lists on the 4th day of May will recognize the injustice that we have been dealt. In all fairness, let's clear this matter up once and for all, and begin to work together for a common goal. Is that really asking too much?"

25. Events of some importance occurred on April 26 and 27, 1983. By a process which the Board was not advised of, and with respect to which all of the General Hospital employees who testified indicated they had minimal or no involvement, a decision was reached among the General Hospital employees that they would meet together over the period of the evenings of April 26th and 27th in the basement of the home of Mrs. Nicole Drouin. It will be recalled that Mrs. Drouin had been one of the three General Hospital employees at the meeting on April 20th. Mrs. Drouin testified that although she had offered her basement, she had not been involved in organizing the meetings. Mrs. Drouin also testified that the only reason for holding the meetings had been to dispel false rumours that had been circulating. Miss Savaria, the president of Local 1967, testified that she understood that the meetings had been called because employees wished further information. Miss Savaria added that no one had asked her if there could be a meeting, and that she did not tell other employees that there would be a meeting. No former employees of the Smith Clinic were invited to or attended at the meetings. When asked why this was so, Mrs. Drouin testified that it was because the Smith employees had been starting rumours that the vote was to deal with the status of RNA specials and shift rotations. Miss Savaria testified that she did not know why the former Smith Clinic employees had not been invited.

26. It was the contention of all of the General Hospital employees who testified that the two meetings in Mrs. Drouin's basement had not been union meetings. In this regard they noted that unlike the situation with union meetings, no notices had been posted about the meeting, and no national representative from the Canadian Union of Public Employees was in attendance. Notwithstanding these facts, however, all five members of the executive of Local 1967 were in attendance on both April 26th and April 27th. On both nights the format of the meeting was basically the same. When people arrived they were asked to sign their names in a book, a procedure also used at regular union meetings. The meetings commenced by Miss Savaria, who was seated behind a desk, telling those present that the meeting was not a union meeting and that she was not present as president of the local. Miss Savaria testified that she also stated that she did not want anyone to speak against anyone else. Mrs. Drouin remembered Miss Savaria's comment as being that she did not want anyone to speak against the former Smith Clinic employees.

27. Following Miss Savaria's comments, Mrs. Drouin addressed the meeting. Mrs. Drouin explained the concept of integrated seniority. There was then passed around one of the copies of the integrated seniority lists which Mr. McLaughlin had made available at the meeting on April 20, 1983. Down the side of the lists, however, had been added numbers to indicate to the employees where they would stand on a seniority list with all of the General Hospital employees on top, and the former Smith Clinic employees on the bottom. The employees present then broke up into smaller groups for discussion, generally with employees who worked together in each of the groups. These discussions appear to have centered around the issue of seniority, although some social discussion also occurred. During the meetings, coffee, cheese and crackers were served. Some 86 out of the approximately 110 General Hospital employees attended at least one of the meetings.

28. As it happened, on one of the nights that a meeting was held at Nicole Drouin's house, a former Smith Clinic employee chanced by the house and became suspicious of the large number of cars parked nearby. Phone calls to the homes of three members of the Local 1967 executive produced responses that the individuals in question were not home, as well as an indication that their absences might be union related. A brother of one of the complainants then noted the licence plate numbers of the cars parked near Mrs. Drouin's home. It was later established that the cars belonged to General Hospital employees. These events prompted the preparation of the instant complaint on May 3, 1983, and its filing with the Board on May 4th.

29. On May 3, 1983 the two planned meetings of the local membership were held, one in the afternoon and one in the evening. Due to the preponderance of former Smith Clinic employees working on the night shift, the afternoon meeting was dominated by former Smith Clinic employees and the evening meeting by General Hospital employees. One of the Board's Labour Relations Officers was present at both meetings, and at both he indicated that the instant complaint had already been prepared. At the afternoon meeting Ms. Butler, a former Smith Clinic employee, moved two motions. One of the motions was to postpone the vote, while the second was to have the ballot box sealed and the ballots not counted. It is not clear on the evidence whether these motions were ruled out of order or were eventually voted down at the evening meeting. In any event, they did not carry. Mr. Lebel and Mr. Rouleau spoke at both meetings and indicated that they recommended that the integrated seniority lists be adopted. All of the witnesses agreed that Mr. Lebel made an impassioned plea in both the French and the English languages in favour of the general principle of integrated seniority as well as its application in the instant case. At both meetings Mr. Lebel was followed by Mr. Rouleau. There is some conflict in the evidence as to what Mr. Rouleau stated. Mr. Rouleau testified that he made a rather lengthy speech in English and French recommending acceptance. At least two witnesses, namely, Miss Savaria and Mrs. Lise Lauzon, testified that they could not recall Mr. Rouleau having spoken at all. On balance, however, I accept the evidence of certain other witnesses that Mr. Rouleau did speak, but that all he said in English and in French was that he recommended acceptance of integrated seniority.

30. The vote on the issue of integrated seniority was held on May 4, 1983. The ballots cast were counted, but not officially announced. From the testimony of persons present at the counting of the ballots, it appears that the result was approximately 103 - 65 in opposition to integrated seniority. This split roughly paralleled the numerical split between former Smith Clinic and General Hospital employees.

31. A meeting of the membership of Local 1967 was scheduled for June 15, 1983 at which the results of the vote were to be officially announced. No union business was actually conducted at the meeting, however, due to a lack of a quorum. Previously, union meetings had been scheduled only in the evenings. This had been a cause of concern on the part of the former Smith Clinic employees. As already noted, because their seniority with the Smith Clinic was not being taken into account, many of the former Smith Clinic employees were permanently assigned to the night shift. One of the terms of the Minutes of Settlement had been that henceforth two union meetings would be held, one of them in the afternoon so that employees on the night shift could attend. However, only one union meeting was held on June 15, 1983, and that was in the evening. Mr. Rouleau, who in accordance with general practice attended the meeting, testified that it was not until he was actually at the meeting that he recalled the agreement that two meetings must be held. Miss Savaria, the president of the local,

however, indicated that she had not forgotten about the two-meeting issue. Instead, when asked in cross-examination about the matter, Miss Savaria indicated that the executive of the local had decided to only hold one meeting since the vote had been in favour of the General Hospital employees. Mrs. Savaria was then asked if she was on that side (i.e. the side of the General Hospital employees). She replied in the affirmative.

32. During the course of her cross-examination Miss Savaria was asked if there were two factions within the union local, and whether she viewed the situation as involving "we" and "them". Miss Savaria denied that either was the case. However, I am satisfied that Miss Savaria's testimony when taken as a whole, including her comments relating to the union meeting on June 15, 1983, indicates that there was in fact a split between the General Hospital and former Smith Clinic employees, and that Miss Savaria viewed herself as part of the General Hospital group. Miss Savaria was the only member of the executive of Local 1967 to testify. However, from her testimony, and from the fact that the local's executive appeared to be acting in concert, with all five executive members attending both of the meetings at Mrs. Drouin's house, I feel it reasonable to infer that the other four members of the executive shared Miss Savaria's view of the matter.

33. As indicated earlier, the issue in these proceedings is whether or not there was a violation of the Minutes of Settlement. The complainants contend that they were violated in a number of ways. The easiest contention to deal with relates to an allegation that Mr. Rouleau violated an agreement not to go to the press. The understanding not to go to the press had not in fact been included in the written Minutes of Settlement. Further, it is clear that Mr. Rouleau talked to the reporter from the Vankleek Hill Review prior to the oral understanding even being reached. Accordingly, Mr. Rouleau did not breach the agreement by going to the press. The timing of the article was indeed unfortunate. Even more unfortunate was the fact that a key portion of the newspaper report was incorrect and from the way the article was written one might conclude that Mr. Rouleau had provided the erroneous information to the press. As already noted, however, Mr. Rouleau testified that he had not in fact given the incorrect information to the reporter. In addition, Ms. Butler's letters to both the Vankleek Hill Review and the Hawkesbury Express likely went a long way to correct any misunderstandings related to the question of why certain of the Smith employees had received cash payments.

34. Although they apparently had not thought so at the time, at least certain of the complainants became concerned that when Mr. Rouleau met alone with the three General Hospital employees on April 20, 1983 he might have been "conspiring" with them to the detriment of the former Smith Clinic employees. I am satisfied, however, that such was not the case, and that Mr. Rouleau's actions were designed only to secure the agreement of the three General Hospital employees to the April 14, 1983 Minutes of Settlement.

35. The complainants contend that Mr. Rouleau violated the Minutes of Settlement in that he did not "wholeheartedly" recommend the principle of integrated seniority to the local's membership. The complainants contend that his failure to do so took on increased importance due to the fact that unlike Mr. Lebel, Mr. Rouleau was well known to the local's members. As already indicated, I am satisfied that unlike Mr. Lebel who made an impassioned speech in favour of integrated seniority, Mr. Rouleau went no further than to state in English and in French that he recommended integrated seniority. On the other hand, however, Mr. Rouleau in no way qualified his recommendation. This being the case, I am content that Mr.

Rouleau did in fact meet the requirements under the agreement for recommending acceptance of the integrated seniority lists.

36. The complainants primarily base their case on the meetings of April 26th and 27th at Nicole Drouin's home. They contend that these were meetings of the union membership to which the former employees of the Smith Clinic were not invited, and that the intent and effect of the meetings was to defeat the purpose of the May 3, 1983 meetings. Counsel for the complainants further contends that by holding the two meetings the executive of Local 1967 insured that the former Smith employees would not be fairly treated. Counsel submits that it is impossible to now re-create the situation contemplated by the Minutes of Settlement, in consequence of which the Board should deem ratification of the integrated seniority lists. The position of the Canadian Union of Public Employees and the group of General Hospital employees is that the final decision with respect to integrated seniority was left to the local's membership, and the decision of the membership as reflected in the May 4, 1983 vote should be allowed to stand. Counsel for the employees contends there was no breach of the Minutes of Settlement and that the meetings on April 26th and 27th had not been union meetings. He further submits that if the Board were to conclude the settlement had been breached, the appropriate result would be to order a new vote.

37. As indicated earlier, the issue in these proceedings is only whether the settlement to the earlier section 89 complaint was breached. That settlement provided that there be two union meetings on May 3rd at which union representatives would urge acceptance of the idea of integrated seniority and that a vote would then be held on May 4, 1983. The settlement also provided that the parties would carry out the terms of the settlement in good faith.

38. A clear implication from the Minutes of Settlement, and one that everyone understood, was that the only union meetings to be held prior to the vote were to be those on May 3rd. However, meetings were held on April 26th and 27th. I am satisfied that these meetings were in fact meetings of Local 1967 from which an important component of the local, namely the former Smith Clinic employees, were excluded. I base this conclusion on a number of grounds. One is the fact that the purpose of the meetings was to deal with employment related matters. Further, the meetings were highly structured. One would not generally expect either a sign-in procedure or speeches at a social gathering. Most importantly, all five members of the local's executive were in attendance on both evenings. No one sought to explain why this was the case, and the reasonable inference is that they were present on both evenings because they were members of the executive. It is of some interest that the meetings on both evenings were commenced by Miss Savaria, the local's president, stating that the gathering was not a union meeting. She likely made this comment because, given all of the circumstances, the employees present would reasonably have concluded that they were in fact union meetings. Merely saying they were not union meetings, however, could not change the reality of the situation, namely, that the executive of Local 1967 was involved in meetings of the local membership from which the former employees of the Smith Clinic had been effectively excluded. I find these meetings to have been in violation of the Minutes of Settlement as being union meetings held in addition to the union meetings agreed to in the Minutes of Settlement. The meetings also violated paragraph 5 of the April 14, 1983 Minutes of Settlement in that the meetings were held only in the evening with no corresponding meetings in the afternoon. Having regard to the considerations, I find that Local 1967 failed to comply with the terms of the settlement of the earlier section 89 complaint, and accordingly, conclude that Local 1967 violated section 89(7) of the Act.

39. The Minutes of Settlement indicated that the employees in the bargaining unit were to be advised by national representatives of the Canadian Union of Public Employees that they recommended integrated seniority. It is reasonable to infer that this was designed to ensure that when the employees decided how to vote, one of the factors they would take into account was the fact that the union favoured integrated seniority. I am satisfied that one of the effects of the meetings on April 26th and 27th was to indicate to those present that the executive of Local 1967 opposed integrated seniority. I am further satisfied that the meetings were used as a vehicle to appeal to the self-interests of the General Hospital employees. These actions ran counter to the intent and purpose of the Minutes of Settlement, and accordingly, I am led to conclude that the actions of the executive of Local 1967 had the effect of undermining the purpose of the Minutes of Settlement.

40. The difficult issue now becomes one of deciding on an appropriate remedy. Counsel for the group of General Hospital employees contends that the appropriate response would be for the Board to direct the taking of a new vote. I do not, however, believe that the situation contemplated by the Minutes of Settlement can now be created so that a new vote could be held in accordance with the spirit of the settlement. The complainants settled their original complaint on the basis that prior to a vote, employees would be addressed at union meetings by national representatives of the Canadian Union of Public Employees and told why integrated seniority was preferable. Doubtless the complainants felt that such an appeal would lead to some of the General Hospital employees voting for integration even though it would be against their own interests to do so. However, before this could occur, Local 1967 held meetings where the self-interest of the General Hospital employees was directly appealed to. I do not believe that the effects of this appeal to self-interest can now somehow be removed.

41. Counsel for the complainants contends that the only appropriate response is for the Board to “deem” the acceptance of integrated seniority. The difficulty with such a remedy is that it is far from clear that integrated seniority would have been accepted if the vote had preceded in accordance with the agreed to Minutes of Settlement. Quite apart from the relative numbers involved, it seems highly probable that if the formal meetings of April 26 and 27, 1983, had not been held, individual General Hospital employees would have lobbied against integrated seniority without in any way breaching the Minutes of Settlement. Further, to deem integrated seniority would impose a result upon a sizable number of General Hospital employees who were not involved in attempts to undermine the terms of settlement. In these circumstances, I am not satisfied that the appropriate response to the breach of the settlement is to simply impose integrated seniority.

42. There is no easy remedy in this case. Because of the nature of the settlement and the way it was breached, the situation contemplated by the settlement cannot be re-created. In the circumstances, I am reluctantly led to the conclusion that in the unique circumstances of this case the most appropriate result would be to simply set aside the settlement, and allow the complainants to litigate their original complaint on its merits before another panel of the Board. As already indicated, however, my colleagues do not share my view. In that they are in the majority, it is their decision on point which must govern.

DECISION OF BOARD MEMBERS L. HEMSWORTH AND W. F. RUTHERFORD;

1. We concur with the findings of fact set out in the decision of Vice-Chairman Ian C. Springate. We also concur with his conclusion that Local 1967 failed to comply with the

terms of settlement of the original section 89 complaint and thereby violated section 89(7) of the Act.

2. We are unable to agree with the remedy proposed by the Vice-Chairman. The parties entered into a settlement so as to avoid having to litigate the original complaint. In our view, it would not be appropriate to now require the parties to do the very thing the settlement was meant to avoid. Indeed, to do so would in our view undermine the entire settlement process.

3. Local 1967 violated the terms of settlement and thereby ensured that a vote could not be held in accordance with the conditions contemplated by the Minutes of Settlement. In our view, it is appropriate that those who in bad faith sought to undermine the purpose of the vote end up with the very result they sought to avoid. Accordingly, we are satisfied that the appropriate remedy is to require that the parties conduct their affairs on the basis that if the terms of settlement had been adhered to, the vote on May 4, 1983 would have been in favour of integrated seniority.

4. In the result, we direct all of the parties to these proceedings to implement the procedures agreed to be followed once integrated seniority was adopted.

2574-83-U Ladelle Hiles, Complainant, v. Carman Dinanno, Respondent

Practice and Procedure – Unfair Labour Practice – Complaint not setting out sections of the Act alleged to have been contravened – No remedy requested and no particulars set out – Suggestion of harrasment by foremen not indicating how Act violated – Dismissed without hearing

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members J. Wilson and C. A. Ballentine.

DECISION OF THE BOARD; February 8, 1984

1. This is a complaint filed under section 89 of the *Labour Relations Act*. It is the second such complaint which the complainant has launched. The early complaint was returned to Miss Hiles, without processing, because it did not contain adequate information. The letter from the Board's Solicitor which accompanied the complaint when it was returned includes the following comments:

I observe that the forms which you filed have not been dated or signed by you, do not indicate what section or sections of the *Labour Relations Act* have been violated, do not specify the relief or remedy you seek, nor do they state the nature of each act or omission which you allege gives rise to a violation of the *Labour Relations Act*.

With the Solicitor's letter were included: blank copies of Form 58, a copy of the Guide to the Labour Relations Act, and several Board pamphlets, including one explaining unfair labour practice proceedings. The Solicitor suggested in his letter that it would probably be appropriate for the complainant to consult a lawyer or someone knowledgeable in labour relations matters, before making a new allegation of a breach of the law.

2. The present complaint was filed on February 7, 1984. It is dated January 29, 1984 and signed. The named respondent is "Carman Dinanno (foreman)". In the space provided for the sections alleged to have been contravened, one finds the words "section 11.30 art-x". The space stating the relief requested is incomplete and paragraph 4, which requires a concise statement of the acts and omissions complained of has not been completed either.

3. In the circumstances, it is a little difficult to determine what this complaint is all about – although it would appear that an employee is claiming that she is being harassed by her foreman. There is nothing to indicate what, if anything, this has to do with rights or remedies under the *Labour Relations Act* since, as we have already noted, there is no reference to any section of the Act nor anything on the face of the documents to indicate any misconduct which would fall within the scope of the *Labour Relations Act*. On the contrary, the only reference on the complaint appears to be to some provision in a collective agreement which was neither spelled out nor filed with the Board. Complaints of a breach of a collective agreement are ordinarily dealt with through the grievance-arbitration provisions in the collective agreement itself – *not* by the Labour Relations Board (see section 44 of the Act).

4. Section 71 of the Board's Rules of Procedure deals with situations, such as the present one, where a complaint filed with the Board does not make out a *prima facie* case

for the relief requested. In other words, the complaint on its face, even if true, does not disclose a breach of the *Labour Relations Act*. Section 71 reads as follows:

71.-(1) Where an application or complaint does not, in the opinion of the Board, make out a *prima facie* case for the remedy requested, the Board may dismiss the application or complaint without a hearing and it shall in its decision state the reason for the dismissal.

(2) The applicant or complainant may within ten days after he is served with the decision of the Board under subsection (1) request the Board to review its decision.

(3) A request for review under this section shall contain a concise statement of the facts and reasons upon which the applicant relies.

(4) Upon a request for review being filed, the Board may,

(a) direct that the application or complaint be re-opened and proceeded with by the Board in accordance with the provisions applicable thereto;

(b) direct the registrar to serve the applicant and any other person who in the opinion of the Board may be affected by the application or complaint with a notice of hearing to show cause why the application or complaint should be re-opened; or

(c) confirm its decision dismissing the application or complaint.

In other words, where, in the opinion of the Board, there is no *prima facie* case, the complaint may be dismissed by the Board without a hearing. The purpose, of course, is to avoid the time and expense of a legal proceeding when there is initially no apparent basis for the case at all.

5. Having regard to the foregoing, this complaint is hereby dismissed.

2311-83-R Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. **Holiday Juice Ltd.**, Respondent, v. Group of Employees, Objectors

Certification – Practice and Procedure – Employees actually working for short time on application date before being laid-off deemed to have worked on application date – Employee not working due to injury but visiting workplace “not actually at work” – Person laid-off on arrival at work deemed to have worked and included for purposes of count

BEFORE: Richard M. Brown, Vice-Chairman, and Board Members J. A. Ronson and W. F. Rutherford.

APPEARANCES: *Lewis Gottheil and Jim O'Donnell for the applicant; L. Bertuzzi and D. Kotwicki for the respondent; Raymond Casha and Shukri Juri for the objectors.*

DECISION OF THE BOARD; February 6, 1984

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. Having regard to the agreement of the parties, the Board further finds that the following unit is appropriate for collective bargaining:

all employees of the respondent in Mississauga, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.

4. The parties disagree as to whether or not four people are to be counted as employees for the purpose of calculating the degree of support enjoyed by the union. Two individuals – Scott Durham and Richard Price – actually worked for a short time on January 9th, the date the application was filed, before they were laid off for an indefinite period. Ajmer Nirwan was told of his indefinite layoff as soon as he arrived at the employer's premises on January 9th, before he reached his work station. Barry Storr telephoned his employer at 7:00 a.m. on January 9th and said he was unable to work that day due to a knee injury for which he intended to seek medical care. He was asked to visit the plant later that day to speak to Bill Smith, the sales manager. Upon arriving at the plant, Mr. Storr learned he too was being laid off indefinitely. These employees are also the grievors in a section 89 complaint that is the subject of another proceeding.
5. Section 7(1) directs the Board to determine the number of employees in the bargaining unit at the time an application was made. According to section 113(2), an application is made on the date it is sent by registered mail.
6. This determination of who was an employee on this date is typically based upon

information that is initially provided by an employer but is subject to scrutiny by a trade union. The information is set out on Schedules A through D which bear the headings set out below.

SCHEDULE "A"

List (Alphabetically arranged) of all employees in the bargaining unit described in the application of the applicant as at the day of , 19 .
(Do Not include the names of employees that appear in B, C or D.

Name	Occupational Classification
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SCHEDULE "B"

List (Alphabetically arranged) of all employees regularly employed for not more than twenty-four hours per week in the bargaining unit described in the application of the applicant as at the day of , 19 .

Name	Occupational Classification
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SCHEDULE "C"

List (Alphabetically arranged) of all employees who were *not actually at work* on the day of , 19 , by reason of lay-off, in the bargaining unit described in the application of the applicant as at the day of , 19 .

Name	Occupational Classification	Date of Lay-off	Expected Date of recall
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SCHEDULE "D"

List (Alphabetically arranged) of all employees not previously shown who were *not at work* on the day of , 19 , in the bargaining unit described in the application of the applicant as at the day of , 19 .

Name	Occupational Classification	Last Day Worked	Reason for Absence	Expected Date of Return
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(emphasis added)

7. The names of employees who actually work on the day an application is made, even for less than their regular hours, ought to appear on Schedule A or B – A for full-time employees and B for part-time employees. These people are treated as employees on the date of the application without further inquiry into their past or prospective employment, because they are actively employed on that date. See *Dominion Paving Limited*, [1981] OLRB Rep. Oct. 1370 and *Windsor Tube & Metal Inc.*, [1977] OLRB Rep. June 396.

8. Employees who are not scheduled to work on the day of the application are listed on Schedule C and D – C for those absent due to layoff and D for those absent for other reasons. The status of these employees is determined by applying what is commonly known as the 30/30 rule. Anyone who works within the month immediately preceding the application *and* is expected to return (or returns) to work within the month immediately following the application is an employee on the application date. A person whose most recent or next expected appearance at work falls outside these time limits is not closely enough linked, through active employment, to the application date to be viewed as an employee at that time.

9. The vast majority of employees either work on the application day or are scheduled in advance not to work that day. But occasionally an employee who is scheduled, when the day of the application arrives to work that day does not actually work. The Board has held a person who reports to the employer's premises on the application day with an expectation of working and is laid off indefinitely before doing any work is an employee on that date. See *Amplifone Canada Ltd.*, [1967] OLRB Rep. Dec. 840 and *Bond Place Hotel*, [1982] OLRB Rep. Aug. 1135. This legal result has been reconciled with the wording of the schedules by interpreting the phrase "actually at work" to refer to attendance at the workplace with an expectation of working.

10. The Board has not previously ruled upon the status of an employee who is scheduled, when the application day dawns, to work that day, who then reports an injury and so does not work, but who visits the workplace at the employer's request. There is no obvious right answer to the underlying question of labour law policy: Is there a sufficient temporal nexus between this person's active employment and the application date to treat him as an employee on that date, without regard to former and future employment (i.e. without applying the 30/30 rule)? If the performance of work on the day of the application is the test, the answer is no. But a strong argument can be made that a person who is scheduled, when the day of the application arrives, to work that day is an employee on the day in question, whether or not any work is performed. From the perspective of labour law policy there is no single, correct answer because, the *precise* location of the line between those who are included and those who are excluded is inherently arbitrary. However, administrative concerns must be weighed along with labour law policy. Wherever the line falls, it should be sharply drawn to

assist employers to initially place names on the correct schedule and to minimize subsequent disputes as to who was an employee on the application date. The performance of work criterion is easily applied, because the necessary information appears on the employer's payroll records. But a test that turns upon being scheduled, when the day of the application arrives, to work that day (and/or upon being at the workplace on management's invitation) is more cumbersome. To determine an employee's status one must know whether he reported his injury on or before the application date (and/or whether or not he visited the employer's premises on request). Consequently, this test increases the potential for factual errors and disagreement. And the time and energy consumed in the process produces a determination which is, at best, marginally superior to the result achieved by applying the much simpler performance of work criterion. There is a secondary reason for preferring that test. It fits best with the phrase "actually at work" already found on the Board's schedules. An employee who does not perform work on the application day, due to an injury, but who visits the workplace is not "actually at work" that day. This person's name belongs on Schedule D.

11. Scott and Price were clearly employees on the application date because they worked on that day. The Board's practice has been to place someone like Nirwan – who was laid off when he arrived at work – on Schedule A. Storr, who did not work due to his injury, falls on Schedule D and is excluded from the count by the 30/30 rule. Given this determination, the union is not entitled to certification without a vote – unless the petition is found to be involuntary or the section 89 complaint succeeds.

12. The applicant has filed documentary evidence which establishes that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on January 18, 1984, the terminal date fixed for this application and the date which the Board established, pursuant to section 103(2)(j) of the Act, to be the time for determining membership under section 7(1) of the Act. This evidence is in the form of membership cards containing a combination application for membership and receipt. The applications are signed by the individual employee concerned, and the receipt is countersigned by the collector and acknowledges the payment of five dollars. These cards comply with the membership criteria prescribed by section 1(1)(l) of the Act and established by the Board pursuant to section 103(2)(j). The documentary evidence of membership is supported by a properly completed Form 9, Statutory Declaration, attesting to its authenticity. There is nothing to suggest the employees who signed these cards did not do so because they decided of their own free will to be represented by the applicant. Accordingly, in the absence of other evidence relating to membership, the union has a sufficient level of support to be certified pursuant to section 7(3) of the Act without recourse to a vote.

13. However, a group of employees have also filed a petition signed by a number of people who are opposed to the certification of the applicant. This petition contains the names of some individuals who previously signed membership cards and paid one dollar to the applicant, and who thereby became members of the union within the meaning of section 1(1)(l) of the Act. Indeed, less than fifty-five per cent of the employees in the unit, on the application date, signed a card but did not sign the petition. Consequently, if the employees whose names appear on both a card and the petition signed the petition voluntarily, the Board would normally exercise its discretion under section 7(2) of the Act by ordering a vote. Conversely, a petition spawned by improper employer influence, either real or perceived, would be disregarded and would not preclude certification on the basis of membership evidence.

14. The Registrar is directed to consolidate this proceeding with Board File No. 2368-83-U and to schedule a hearing into the voluntariness of the petition and the section 89 complaint at the earliest possible date.

1956-83-R The Canadian Union of Public Employees, Applicant, v. The Hospital For Sick Children, Respondent, v. Group of Employees, Objectors

Bargaining Unit – Practice and Procedure – Practice in province to exclude technical and paramedical employees from service units – Hospital seeking to include many technical and paramedical classifications – Board expressing concern as to procedural and practical consequences of delay – Not following normal practice of appointing LRO to report on duties and responsibilities – Directing hearing to narrow matters in dispute – Appendix to decision containing list of disputed classifications directed to be posted

BEFORE: R. O. MacDowell, Vice-Chairman and Board Members W. H. Wightman and W. F. Rutherford.

APPEARANCES: *Helen O'Regan, Romeo Best, John Vanelli and J. Anderson for the applicant; F. G. Hamilton, Q.C., J. E. Stibbards, Graydon McNair and Valerie Cassells for the respondent; Barry Edson, Fran Macaluso, Marilyn Becker and Robin A. Barclay for the objectors.*

DECISION OF THE BOARD; February 14, 1984

I

1. This is an application for certification. It may affect a large number of the employees of Sick Children's Hospital. The original hearing notice to employees did not clearly identify the major issue in this case, and it is difficult to do so on the space provided on the notice form. The Board therefore directs that this decision be posted along with notices of the continuation of the hearing in this matter, in prominent places where they will come to the attention of the employees who may be interested.

2. In this application, the union (CUPE) has applied to represent a bargaining unit of hospital service workers. The unit includes such groups as: kitchen staff, cleaning staff, laundry staff, orderlies, nurses' aides, and so on. Service units of this kind are common in Ontario hospitals. CUPE represents service units at Toronto General Hospital, Toronto Western Hospital, and North York General Hospital. There are service units represented by the Service Employees' International Union at Toronto East General Hospital, Wellesly Hospital, and Mount Sinai Hospital.

3. Typically, such service units *exclude* technical and paramedical employees. In a recent case involving St. Joseph's Hospital in Sarnia (Board File 0448-83-R), the Board had

occasion to set out what has become the “standard” or “normal” description of the appropriate “service” unit. It is based upon what has become the established practice in the province, and reads as follows:

All employees of [Name of Hospital] save and except professional medical staff, graduate nursing staff, under graduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, social workers, social work assistants, persons engaged in research work, technical personnel (including in this exception, graduate and undergraduate: audiologists, physio-, occupational, psychiatric and speech therapists, psychologists, psychometrists, computer programmers, biomedical repair technicians, certified and non-certified dental assistants, photography technicians and artists-medical illustrators, registered, non-registered and student; laboratory technicians, X-ray technicians, respiratory technicians, electrocardiogram technicians, electroencephalogram technicians, pulmonary technicians, nuclear medicine technicians, ophthalmic technicians and laboratory assistants) supervisors, persons above the rank of supervisor, foremen, persons above the rank of foreman, chief engineer, office and clerical staff (including in this exception: ward clerks, admitting clerks, receptionists, safety and security officers, information clerks, mail clerks, cashiers, librarians and switchboard operators), security guards, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.

The details will obviously vary from hospital to hospital depending on the particular paramedical or technical groups employed, but the point is: *technical and paramedical employees are generally excluded from the service unit.*

Technical and paramedical personnel are either not represented by a trade union at all or have their own separate bargaining unit.

II – Union Position

4. In this particular application, the union seeks to represent employees in what it describes as a “standard” service employee bargaining unit. *The union does not seek to represent paramedical or paraprofessional employees* such as dietitians, psychometrists, physiotherapists, audiologists, speech therapists, dental hygienists or social workers. *The union does not seek to represent paramedical or paraprofessional employees* such as dietitians, psychometrists, physiotherapists, audiologists, speech therapists, dental hygienists or social workers. *The union does not seek to represent the technicians or technologists* employed in the Hospital’s medical departments or laboratories (X-ray, radiology, etc.). The union’s position is that these technical and paramedical personnel do not share a community of interest with service workers, and should not be put in the same bargaining unit as service workers. The union submits that in dozens of hospitals across the Province, technical and paramedical employees have been routinely excluded from the service employee bargaining units on the agreement of the parties; moreover, until this case there has never been any real difficulty in drawing the line. The union argues that Sick Children’s Hospital is not all that different from these

other Ontario hospitals and it is absurd to suggest, for example, that social workers with post-graduate training should be bargaining together with dishwashers or orderlies. The union submits that until this case arose, no hospital ever considered putting laboratory and cleaning staff in the same bargaining unit.

5. The union's position is supported by a group of employees who appeared at the first hearing to voice their concerns. They argue that they have a separate community of interest and should not be included in the same bargaining unit as the service employees whom the union seeks to represent. Like the union, they argue that technical, paramedical or para-professional employees should not be "lumped in" to the service group with the so-called "standard unit" which the union proposes.

III – Hospital Position

6. The Hospital, their employer, does not agree. The Hospital agrees that some paramedical/technical employees should be excluded, but submits that there is no rigid distinction between service, paramedical, and technical personnel. The Hospital argues that there are large numbers of technical personnel who should be included in the service bargaining unit that the union seeks to represent – regardless of what might be the practice at other hospitals. The Hospital asserts that it does not matter that these individuals may not *want* to be included in the bargaining unit, or that the union does not seek to represent them. In the Hospital's submission, they have an objective community of interest with the service workers and should, therefore, be included in that bargaining unit. The Hospital maintains that the practice in other hospitals is not very helpful because: the bargaining unit descriptions in those cases were based upon the agreement of those other hospitals and their unions rather than any decision of this Board; the unit descriptions themselves are not uniform; and, in any event, Sick Children's Hospital is a unique institution which cannot be compared with other hospitals.

IV – Decision

7. The Board is very concerned about the practical and procedural consequences of this case. Preliminary indications suggest that there are a large number of classifications in dispute involving as many as several hundred employees. The employer asserts that they should be included in the bargaining unit because they share a community of interest with other service workers, while the union argues that they should be excluded. To resolve these issues, could take numerous days of hearing, potentially extending over many months. The cost is obvious. The delay is undesirable. And meanwhile, the wages, working conditions and benefits of employees potentially affected by this application may be frozen pursuant to section 79 of the Act. We are concerned that whatever the merits of the parties' respective positions, this is not a recipe for happy employer/employee relations.

8. There are certification cases with bargaining unit problems that can best be resolved by the appointment of a Labour Relations Officer to meet with the parties and, if necessary, examine the positions in dispute. However, we do not think that approach is appropriate at this stage of the present proceeding. Rather, it is our view that this case should come before the Board for a further hearing to determine the extent to which, with the assistance of the Board and its Officers, the parties can narrow the matters in dispute between them. To this end, prior to the next hearing the parties should investigate and particularize the technical and

paramedical classifications in dispute, together with the duties and functions performed by employees in those classifications. Since it is the Hospital which is seeking to expand the scope of the unit and sweep in employees whom the union does not want to represent and who, it would seem, are not normally included in a service unit, the Hospital should be in a position to particularize the facts upon which it relies and the reasons why its proposed unit is appropriate. It may well be that when both parties examine their positions, they will be able to narrow the issues in dispute between them so that extensive hearings will not be necessary. Likewise, it may be possible for the Board to resolve the status of certain employee classifications solely on the basis of the parties' submissions.

9. The matter is therefore referred to the Registrar to be re-listed for hearing. Attached and to be posted with this decision is a list of technical or paramedical classifications which the union argues should *not be included* in the service unit and which, it seems, the employer argues should be *included*.

[Appendix containing lists of classifications in dispute omitted.]

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1036-83-R Labourers' International Union of North America, Local 183, Applicant, v. **Massi Construction Co. Ltd.**, Respondent, v. Group of Employees, Objectors

Employee – Working foreman not involved in day to day management – Holding 33% of companies shares and company's vice-president – Brother of company president and consulted on company finances and employee wages – Inclusion in unit creating conflict of interest – Excluded as management

BEFORE: Ian C. Springate, Vice-Chairman, and Board Members I. M. Stamp and H. Kobryn.

APPEARANCES: *L. Steinberg, F. Pallazollo and R. Quinn for the applicant; Lou Massi for the respondent; John Bucco for the group of employees.*

DECISION OF THE BOARD; February 27, 1984

1. This is an application for certification filed pursuant to the construction industry provisions of the *Labour Relations Act*.

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3. The respondent filed a list of employees in the proposed bargaining unit containing eight names. The applicant acknowledges that the names of the following five employees were properly included on the list, namely, John Bucco, Rivaldo DiCerce, Nick DiIorio, Antonio

Massi and Dino Plati. The applicant has, however, challenged the inclusion on the list of the names of Mike Massi, Jeff Johnson and Tony Tomini.

• • • •

7. The applicant challenged the inclusion of the name of Mike Massi on the list of employees on two separate grounds. One was that he was not doing bargaining unit work. The evidence does not support this contention. The second ground relates to the claim that Mr. Massi exercises managerial functions within the meaning of section 1(3)(b) of the Act. At times Mr. Massi works as a working foreman and at other times he works as a labourer. He plays no direct role in the day-to-day management of the company, these functions being handled by Mr. Lou Massi, the respondent's president. Mike Massi is not, however, simply a regular employee of the respondent. He is the brother of Lou Massi. Further, some six and a half years ago Mike Massi invested \$12,000.00 in the company, and in return received thirty-three per cent of the company's shares. Mike Massi is the respondent's vice-president. Unlike other employees who are paid on an hourly basis, Mike Massi receives a salary of \$400.00 per week. He also receives dividends from the company's profit. Although Lou Massi handles the day-to-day management of the company, he meets with Mike to discuss the company's financial situation, including the respondent's labour costs and employee wages. At the end of the firm's financial year, Mike and Lou Massi discuss how much of the profit is to be retained in the company and how much is to be paid out to the two of them as dividends. The final decision in these matters is made by Lou Massi, presumably because he is the firm's president and major shareholder.

8. Collective bargaining, by its very nature, requires an arms length relationship between the "two sides" whose interests and objectives are often divergent. If managerial employees were to be included in a bargaining unit, they might find themselves faced with a conflict of interest between their responsibilities as members of management and their responsibilities as union members. Section 1(3)(b) ensures that neither the union nor the employer need be concerned about such divided loyalties. Mr. Mike Massi is a one-third shareholder and vice-president of the respondent. He is involved in decisions relating to the company's overall operations, including matters that impact on employees. We are satisfied that if Mr. Massi were to be included in the bargaining unit, he would likely be placed in a conflict of interest situation. Accordingly, we are of the opinion that Mr. Massi is excluded from the provisions of the Act pursuant to section 1(3)(b). See, *Ed Walkers Electric Ltd.* [1970] OLRB Rep. March 1434. It follows that Mike Massi was not an employee in the bargaining unit on the date of the making of the application and his name should not have been included on the list of bargaining unit employees.

[Editor's Note: Only that portion of the decision dealing with the employee status of Mike Massi has been reproduced.]

1307-83-U Borg Westermann, Complainant, v. Canadian Union of Public Employees, Local 1692, Respondent, v. North York General Hospital, Intervener

Duty of Fair Representation – Unfair Labour Practice – General practice of not inviting grievors to grievance meetings no violation – Not admitting grievor prone to antagonistic behaviour no violation even where general practice to invite grievors – Union judgement as to merit of grievances and refusal to arbitrate not violating representation duty – Analysis of application of duty to role of unions in grievance process

BEFORE: Richard M. Brown, Vice-Chairman.

APPEARANCES: Borg Westermann, David Poulter, for the complainant; Brian Atkinson, Helen O'Regan, William McKinnon and Gary Dennis for the respondent; Brenda Bowlby and Donna Gillis for the intervener.

DECISION OF THE BOARD; February 3, 1984

1. Borg Westermann (the “complainant”) contended that Local 1692 of the Canadian Union of Public Employees (the “union”) has contravened section 68 of the *Labour Relations Act*. The complaint arises out of the way that grievances, filed by Mr. Westermann, were handled by union officials.

I

2. The complainant worked in the kitchen of North York General Hospital (the “employer”) from 1978 until he was laid off from the position of head baker in the fall of 1982. The earliest of the grievances which form the basis of this complaint was filed on February 16, 1982, and concerns a letter of warning issued on February 5th to Mr. Westermann by his employer:

There have been a number of recent incidences with regard to your performance that I advise are unacceptable. They are as follows:

1. On January 27, 1982, the baking refrigerator was cleaned during your absence. The only item in the refrigerator that was dated was the custard. During the week of January 18, 1982, Mrs. H. Carlin informed you that all custards, puddings, and cream pies must be dated. This dating is a standard of the Dietetic Services Department to ensure that the food served is of high quality.

2. On February 2, 1982, the Chef was in the Bake Shop with you and smelled rotting eggs. You were preparing to use this mixture in baking.

3. Recently, two of our Dietetic Interns observed you cracking a full case of eggs. These eggs were not used by you and remained outside the refrigerator all day.

4. On February 4, 1982, you removed a case of eggs from the fridge and left the Hospital without returning the eggs to the fridge.

All of the above actions by you are in breach of standards established by the Dietetic Services Department. Our standards have been outlined to you on a number of occasions.

Furthermore, an incident occurred on February 2, 1982. At approximately 1025 hours there were a few items in the Cafeteria containers for coffee break. Mrs. Maxwell asked you for more items. An hour later she had only received tea biscuits and went back herself to get other baked goods. At this point you began to shout at her. Your shouting was also heard by the Chef. This behaviour will not be tolerated. I ask for your cooperation in working effectively with other staff members in order that this type of incidence can be avoided.

In order to assist you to adhere to the Departmental standards, I outline them as follows:

1. Label and *date* all items in the bake shop refrigerator. An example would be muffin mix, custards, puddings, etc.
2. All items must be covered in the refrigerator as this is a requirement of the North York Health Inspector.
3. Cream pies and cream puddings must be made fresh each day, except on the weekends when two days is the maximum time they should be kept.
4. Work closely with *Ismet Hysenaj* and *Mrs. H. Carlin* to develop new bake shop recipes, to ensure they are tested and of proper quality for selling in the Cafeteria.

This letter serves as a warning to you that your performance must improve.

The grievance sought the complete withdrawal of this letter, alleging violations of three contract clauses – the management rights clause, the no discrimination clause and Article 8.01 which is set out below:

8.01 Copies of Disciplinary Notices concerning warnings, suspensions and discharges shall be given to the employee concerned and the Union. It is agreed that any written reprimand which is to be placed on the record of any employee shall be recorded within a reasonable time after the occurrence of the matter which is the subject of the written reprimand or within a reasonable time after the Hospital has become aware of the occurrence. The Hospital will send a copy of such written reprimand to the Union and to the employees concerned and it is agreed that the time period for filing any grievances which propose the elimination of the

written notice of discipline shall begin on the fifth day after the reprimand is issued. *An employee, who has completed his probationary period and who has been called to a meeting by his Supervisor, or other management person, for the purpose of receiving disciplinary suspension or discharge shall be advised of the purpose of the meeting and shall have the right to request the presence of a Union representative.* If the Steward designated to represent the employee is not available, the employee may request the assistance of one of the other Stewards. The Steward attending the meeting must have obtained permission of his supervisor.

(emphasis added)

Mr. Westermann alleges that he was denied the representation of a union official when he was given the employer's letter of February 5th.

3. At the first step of the grievance procedure, Mrs. Denise Read, the manager of dietetic services, refused to withdraw the letter; but at the step two grievance meeting held on February 16th, the employer agreed to strike out the last sentence of the February 5th letter. With this deletion, the letter was no longer an express warning, but Mrs. Gillis, who is in charge of personnel matters at the hospital, conceded it would remain in the grievor's file. In a letter to Mrs. Read dated March 4th, Mr. Westermann indicated that his grievance would not be proceeding to arbitration:

As you know I filed a grievance with respect to the letter of February 5th, and the answer received was that the discipline contained in that letter, namely the warning, would be deleted. I was not content with this, for I deny the allegations contained in that letter. I am particularly disturbed by the suggestion that I would endanger the health of patients at the hospital by using rotten eggs. This suggestion is preposterous. In view of the withdrawal of the warning, however, I have been advised that I no longer can pursue this grievance under the Collective Agreement, for there is no longer any discipline involved, but I wish to go on record as rejecting the allegations made against me. If any future reference is made to these allegations in dealings between me and the hospital, I shall dispute the hospital's right to refer to them for the reason that no discipline is now involved, thus precluding my right to dispute these allegations through the grievance procedure.

However, in a letter written the next day to Donna Gillis, the complainant stated his intention to go before an arbitrator. On March 9th, William MacKinnon the president of Local 1692, informed Mr. Westermann that the grievance would not be arbitrated:

On Wednesday March 3, 1982 a meeting was called to Mrs. Gillis' office. Present were myself, Garry Dennis, Bruce Barton and Pat O'Brien.

Mrs. Gillis informed us that the last line concerning the word "Warning" has been withdrawn from your letter. This was the basis of your grievance. The letter is now referred to as a letter of instruction relating to your job activities.

Ontario
Labour Relations
Board

MONTHLY HIGHLIGHTS

June, 1984

Editor: Nimal V. Dissanayake, Solicitor

Board holds union owed duty of fair representation to part-time employee

A part-time employee alleged a contravention, inter alia, of the duty of fair representation by the union, during the negotiations for a collective agreement and by refusing to file a grievance on his behalf when he was terminated by the employer from his part-time position. The union and the employer took the position that the union had no representation rights with respect to part-time employees and that therefore no duty of fair representation was owed to the complainant. While the respondents relied on provisions of the collective agreement to support their position, they went on to submit that any ambiguity in the collective agreement should be resolved in their favour because they were in agreement that part-timers were never intended to be represented by the union.

The Board stated that where both employer and union agree that there is no intention to recognize the union for a group of employees, the Board would require compelling evidence to reach a contrary conclusion. On the other hand, a s.68 complaint cannot fail simply because the union and the employer, (both of whom may be affected by a finding of violation) deny any intention to extend representation to such group. The intention must be gathered from the recognition clause in the applicable collective agreement. Where the clause is ambiguous, the parties' intentions must be inferred from the entire agreement and if still left in doubt, by examining the conduct of the parties.

Examining the collective agreement between the respondents, the Board found nothing in the recognition clause excluding part-timers. Nor could the Board find any provision in the balance of the agreement which had the effect of amending the scope of the recognition clause. While most of the provisions relating to part-timers were designed to protect the full-time employees represented by the union, the requirement that part-timers receive the same minimum wage rate as regular employees and the provision for the check-off of union dues from part-timers, were seen by the Board as negotiating for part-timers by the union and being remunerated for so doing. In

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agreeing to these provisions the employer gave recognition to the union for part-timers. The Board noted that the Canada Labour Relations Board had, prior to the negotiation of the instant collective agreement, held that a duty of fair representation was by the respondent union to a part-time employee, where the collective agreement in question was identical in all essential respects. The instant collective agreement was entered into subsequently, leaving the key contentious provisions unchanged, even though the parties had full knowledge of the interpretation placed upon it by the Canada Labour Relations Board. Therefore, even if the Board were to conclude that the collective agreement left the matter in doubt, from an examination of the conduct of the parties, the Board must conclude that the parties accepted that the union was entitled to represent part-timers as a part of the bargaining unit. That being so, the duty of fair representation also attached.

Turning to the merits, the Board found that the union had failed in its duty under s.68 by failing to consult the complainant during negotiations. Consolidated Fastfrate Limited, re Endel Vesik and Teamsters, Local 938, File 1413-83-U, Dated May 31/84, Panel: C.F. Murray, J. Wilson and W.F. Rutherford.

"Carve out" unnecessary to remedy unfair representation of technical employees

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A group of technical and professional employees of the City of Thunder Bay had filed a complainant alleging unfair representation by CUPE Local 87. They formed an association and in an application for certification, sought a "carve out" from the CUPE unit. In a previous decision the Board dealt with the unfair labour practice complaint only, and found that Local 87 had contravened s.68. (See Monthly Highlights, June 1983) On the question of appropriate remedy, the Board pointed out that the separation of technical and professional employees goes against Board policy as to bargaining unit configuration and expressed its concerns as to the viability of the unit, the jeopardy to job mobility and the adverse effects on industrial stability. Therefore, the Board concluded that the dismantling of the bargaining unit should be a last resort to be adopted only if the Board was satisfied that the failure of representation could not be remedied by some less drastic form of redress.

On the evidence, the Board concluded that such a drastic step was unnecessary, and that the interest of the complainants could be adequately redressed by a remedial order under s.89. The Board

- 3 -

ated that the unlawful conduct, i.e. misrepresentation and removal from the committee had not resulted in any actual loss to the complainants, and that the individuals responsible for the violation were no longer in office. Over the objection of the complainants, the Board admitted evidence that subsequent to the finding of the breach, the union had taken some steps at negotiations to remedy the situation. The request for the return of union dues paid and for costs were also denied.

The Board noted that mistrust and absence of accountability in the negotiation and ratification process were at the root of the problem and that the remedy must be fashioned to correct that situation. Accordingly the Board directed the establishment, on a permanent basis, of a system of proportional representation in the bargaining structure. The bargaining committee was to comprise of five members separately elected from the different levels in the wage grid. This will provide input from the full range of the unit employees in the formulation of bargaining objectives. A posting was also directed. Under Bay, Corporation of the City of, Files 1800-81-U; 1971-82-R, dated: May 4/84, Panel: M.G. Picher, W.F. Rutherford and J.A. Ronson (dissenting).

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Retail food store opened in premises of closed Dominion Store - not sale of business

Dominion Stores operated a retail store in leased premises in a small suburban shopping plaza. The lease had a long term, and its terms were becoming increasingly uneconomic to the landlord. The landlord sought Dominion's surrender of this lease, and when Dominion agreed, the landlord leased the premises to the respondent, which already operated two other retail food stores catering to the "Italian market". The surrender was not contingent on the respondent entering into a lease. The respondent's agreement to lease was not contingent on its obtaining anything from Dominion, and there was no contract between the respondent and Dominion until the latter offered some more equipment for sale, which was well after the respective commitments to surrender and lease had been made. The respondent only became aware that Dominion was selling equipment after the sale had begun and some equipment sold. The respondent bought the remaining unsold equipment for \$56,000, about 15% of its total cost of opening its new store in Dominion's old location. The applicant union sought a declaration that there had been a sale of part of Dominion's business.

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The Board concluded that the landlord was not an intermediary in a sale of Dominion's business to the respondent. While the coincidence of location and similarity of operation favoured a finding of sale when seen in isolation, the independence of the three transactions, i.e.: Dominion's surrender of the lease, the respondent's acquisition of a new lease, and the equipment purchase, point to the contrary. The hiatus of 4 1/2 months during which the premises remained vacant, the existence and similarity of the respondent's pre-existing operation and the fact that the management and key personnel for the new store all came from respondent's existing operations, all weighed against a finding of a sale. On balance the Board concluded that what had occurred was an expansion of a parallel business in which some assets of Dominion came to be used. The request for a declaration of sale was denied. Valencia Foods, File 1463-83-R, Dated May 9/84, Panel: O.v. Gray, J.A. Ronson and W.F. Rutherford.

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Change in Board Personnel

Richard M. Brown, Vice-Chairman left the Board at the end of June, 1984. He has returned to the Faculty of Law at University of Victoria, where he had taught for several years before his appointment to the Board.

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The decision highlights do not set out the entire reasoning of the Board. Therefore any person intending to rely on a Board decision discussed herein should refer to the official decision of the Board, copies of which may be obtained from the Board, prior to publication in the Monthly Report.

In a conversation with officials at Union Headquarters I was informed that management had the right to place letters of instruction on your record though not as a basis for future discipline.

The Grievance Committee therefore recommend that your grievance not be filed or forwarded your grievance to arbitration as we definitely have agreed that this is not an arbitrable matter; that in fact your grievance has succeeded.

Trusting that you find our recommendation is the best and only one that we would reach after reviewing all the facts. If you wish to dispute the decision of the grievance committee, you may appeal to the next membership meeting on April 13th, 1982.

4. The complainant brought his grievance before a membership meeting. The decision taken there was not to arbitrate, but to once again ask the employer to remove the allegations to which Mr. Westermann objected. This request was made in a letter, dated March 25th, from Mr. MacKinnon to Mrs. Gillis. In the meantime, on March 14th Mr. Westermann wrote to Mrs. Gillis, saying that the withdrawal of the accusation relating to rotten eggs was the only remedy he would accept. He also wrote letters to others at North York General Hospital, including two to its president. At a meeting held on March 25th, Mrs. Gillis told Mr. Westermann that the employer was willing to delete the passages in the February 5th letter to which he took exception. (This meeting occurred before the employer received the union's letter of March 25th). Having achieved what he asked for in his last correspondence with the employer, Mr. Westermann was not satisfied. On March 29th, he demanded that the entire "letter of warning" be removed from his personal file and be replaced by a "letter of counsel and direction". This the employer would not do.

5. David Poulter, who assisted in the presentation of the complaint, testified that sometime in 1980 or 1981 Mr. Saine, the then administrator of the hospital, publicly thanked Mr. Westermann for his skilled contribution to the welfare of patients and staff. Walter Lavigne, a maintenance employee, also attested to the quality of Mr. Westermann's baking.

6. Pat O'Brien, the union's recording secretary, testified that the reason why this grievance was not arbitrated was that it could not be won, as the amended letter was not disciplinary in nature. A secondary reason was that the union was experiencing financial problems as a result of a recent strike.

7. Mr. Westermann's layoff in the Fall of 1982 precipitated two grievances. On September 1, 1982, he received a letter from Mrs. Read notifying him that he was to be laid off:

As a result of the conversion of an Ingredient Control/Cook-Chill system in the Dietetic Services Department, the position of Head Baker will become redundant on September 30, 1982.

The length of your seniority entitled you to "bump" several employees in C.U.P.E. classifications in the Dietetic Services, Housekeeping and Central Supply Departments. Before assigning you to a new job we will

have to determine if you are capable of doing the work. If you are interested in pursuing your employment would you please speak to me so that arrangements can be made to facilitate your transfer to a new position.

Please indicate to me, in writing, no later than Friday, September 3, 1982, whether or not you want to take another position.

All baked goods had previously been fully prepared in the hospital, but from this time forward bakery items were made from mix or purchased in a frozen state. Also laid off at this time were an employee classified as a Cook II, who bumped into a housekeeping job, and a student who has since worked only on a casual basis. Mr. Westermann wrote to Mrs. Read on September 3rd:

I am in receipt of your letter dated September 1, 1982 handed to me at 1 P.M. the same day. I fully understand the content and your request that you require an answer by September 3, 1982. Mrs. Read I am convinced you must realize that handing me a letter dated September and expecting a practical answer by September 3 is unrealistic. The decision I make will effect my whole working life. I therefore cannot at this stage give you a truthful answer.

I do however intend to submit a grievance regarding the present situation.

8. A grievance, filed on September 3rd, alleged that the employer had contracted out work in violation of the collective agreement. Mrs. Read replied that the complainant was laid off in accordance with the contract and, in the alternative, any contracting out was properly done in the interests of efficiency. The employer subsequently took the position that technological change had rendered the job of head baker redundant. On September 13th, Mrs. Gillis met with several union representatives – including Mr. MacKinnon and Mr. Brian Atkinson, a national representative – at a second stage grievance meeting. By letter dated September 21st, Mr. MacKinnon informed the complainant that the union's grievance committee had decided there was "no case" to present to arbitration, and advised him of his right to appeal their decision to the union membership. Mr. Westermann declined to take a job in the housekeeping department and was laid off on September 30, 1982. He has not returned to work.

9. The following clauses in the collective agreement are pertinent to this grievance:

10.01 In the event of a lay-off because of lack of work, the employees with least seniority will be first laid off, provided that the remaining employees have the necessary skill and ability to perform the available work.

10.03 The Hospitals will not contract out any work with the objective of effecting a lay-off or reducing the regular hourly rate of pay of any employee in the bargaining unit. The parties agree to consult on a monthly basis or as may be otherwise mutually agreed as to the Hospital's requirements for the contracting out of services.

10.04 The Hospital undertakes to notify the Union in advance, so far as practicable, of any technological changes which the Hospital has decided to introduce which will significantly change the status of employees within the bargaining unit.

The Hospital agrees to discuss with the Union the effect of such technological changes on the employment status of employees and to consider practical ways and means of minimizing the adverse effect, if any, upon employees concerned.

In any event of the proposed layoff at the Hospital of a permanent or long term nature, the Hospital will:

a) meet with the union through the Labour Management Committee to review the following:

i) the reason causing the layoff

ii) the service the Hospital will undertake after the layoff

iii) the method of implementation including the areas of cutback and employees to be laid off.

10. A second grievance relating to the layoff was apparently filed by the complainant on January 12, 1983. A copy of this grievance was submitted to the Board, after the hearing in this matter, by the complainant. No mention was made of this grievance at the hearing, despite repeated requests made by the Board to Mr. Westermann to identify all of the grievances that he believed were improperly handled by the union. Consequently, the union called no evidence with respect to this matter. In these circumstances, the Board cannot properly entertain a complaint relating to the disposition of this grievance.

11. The final grievance was filed on September 10, 1982, claiming that since 1977 the complainant had been wrongfully denied a "skilled tradesman allowance". The reply from Mrs. Read pointed out that the collective agreement did not call for any such allowance and that Mr. Westermann had always been paid at the rate contained in the collective agreement for the job he performed. By letter dated October 6, 1982, Mr. Atkinson advised the complainant that the union grievance committee agreed with the employer's reply. The collective agreement makes no mention of a skilled trades allowance. Several years ago, an interest arbitrator awarded a thirty cent premium to painter, plumbers, carpenters, electricians and stationary engineers. That award also stated that "hospitals *may* increase the rates for other skilled tradesmen". The wage rates for the named trades were adjusted accordingly. Mr. MacKinnon testified that the complainant has on several occasions broached the subject of a skilled trades allowance for bakers. According to Mr. MacKinnon, he relayed this concern to the central bargaining committee that negotiates on behalf of employees in this hospital. David Poulter testified that sometime in 1980 or 1981 he overheard Mr. MacKinnon say that Mr. Westermann was not entitled to a tradesmen allowance because he did not have Canadian papers for his trade and was not even a Canadian citizen. Mr. MacKinnon denied making these statements.

12. Mr. Westermann contended that he was not advised of labour-management meetings at which his grievances were discussed. By letter dated March 5, 1982, he asked Mrs. Read, Mrs. Gillis and Pat O'Brien to provide notice of any such meetings. Mr. MacKinnon testified that the complainant attended the grievance meeting concerning the letter of February 5th. MacKinnon could recall only one such meeting at which Westermann was not present, but MacKinnon was not sure that he attended every meeting. Mr. Westermann did not testify as to which meetings he was invited to attend, even though he was invited several times to give evidence. According to Mr. MacKinnon, grievors sometimes, but not always, attend grievance meetings.

13. Evidence of heated exchanges between the complainant and union officials was also adduced. David Yuen, who was a cook at the hospital, stated he overheard Mr. Westermann and Mr. MacKinnon arguing about a grievance in the cafeteria. According to Pat O'Brien, there was often friction at union meetings between the complainant and Randy Millage, the former national representative. Mr. Westermann had been the president of Local 1697 for several months before Mr. MacKinnon assumed that position in February 1982. According to Mr. MacKinnon, after this succession occurred, he found talking to the complainant to be difficult. Mr. Poulter testified that Mr. MacKinnon stormed out of a union meeting in the summer of 1982 when someone raised the topic of the union's deficit.

II

14. The grievance and arbitration process is an essential component of a regime of collective bargaining. An employee who is fired, refused a promotion or otherwise dealt with by management in contravention of a collective agreement relies upon this legal mechanism for redress. Section 44(1) of the *Labour Relations Act* requires that every collective agreement provide for the arbitration of all contract disputes – or for their resolution by some other peaceful means. But direct access to an arbitrator is not statutorily guaranteed to an individual employee. Instead, the legislature has granted a trade union, the exclusive bargaining agent for all employees, the right to compel the employer to submit a grievance to arbitration. The union's exclusive authority is counterbalanced by its duty to fairly represent each employee. The duty of fair representation is found in section 68 of the Act:

68. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

15. The double barrelled prohibition against discrimination and bad faith is calculated to prevent differential treatment on the basis of such criteria as race, creed, colour, sex and to preclude invidious conduct motivated by trade union politics, personal animosity and favouritism. See *Prinesdomu*, [1975] OLRB Rep. May 444 at para. 24; [1975] 2 Can. LRBR 310, at 315. This aspect of the duty of fair representation is important, but once the pertinent facts are proven, cases of this variety are easily decided. Giving meaning to the word arbitrary is a far more vexing task that must begin with an appreciation of the role played by union officials in contract administration.

III

16. In representing grievors, the officials of a union are called upon to perform two very different sorts of tasks; they investigate employee claims and act as advocates in the grievance process; and they also decide what grievances are to be abandoned, settled, carried to the next stage in the grievance process, or arbitrated. A fair representation complainant typically alleges that an official who acted as investigator or advocate did not exercise proper care or that a decision as to the disposition of a grievance was inappropriate. Although both counts are not infrequently combined in a single complaint, these distinct lines of attack throw up issues of labour law policy that are as different as the two categories of functions carried out by union officials.

17. A disgruntled grievor may challenge only the propriety of the union's decision not to pursue a grievance, and not dispute the union's investigation or advocacy. In this setting, labour relations boards have started from the basic premise that the pursuit of a grievor's claim may adversely affect other employees, and that a bargaining agent is best suited to choose between the competing interests of its constituents. As this Board said in *Ford Motor Company of Canada*, [1973] OLRB Rep. Oct. 519 at para. 38, a union is under "a duty to act fairly in the interests of all members, minority factions, as well as majority factions, individual employees as well as the collective group".

18. In that decision, the Board identified three collective concerns upon which an individual employee's contract claim may impinge. The resolution of many grievances calls for the reconciliation of conflicting job interests. When two persons vie for a single job in the context of a promotion or layoff, a grievor's gain is someone else's immediate loss. More often, the disposition of a grievance will have a prospective effect upon members of the bargaining unit. An arbitration award (or even a settlement) will shape future arbitral decisions (and accommodations) to the detriment of some workers and to the benefit of others. As Professor Cox has demonstrated in "*Rights under a Collective Agreement*" (1956), 69 Harv. L.R. 601, conflict among employees is not limited to matters of layoffs and promotions. On the other hand, some grievances – for example, most discharge cases – pose no threat to the jobs of a grievor's fellow workers. See *Ford Motor Company of Canada*, *supra*, at para. 38, 41 and 42.

19. The second group interest is in the smooth functioning of the grievance process. A well-oiled settlement mechanism is essential to a healthy collective bargaining relationship for two reasons. An agreement crafted by the parties is inherently more sensitive to their needs than is an award fashioned by a third party, who necessarily knows less than they do about the situation and their priorities and is constrained by existing contractual rights. Another advantage of informal settlements is the speed with which they can be fashioned as compared with the time necessary to adjudicate a dispute. These virtues of private accommodation can only be realized if a union does not press undeserving grievances and management responds with an equally cooperative attitude to meritorious claims. See *Ford Motor Company of Canada*, *supra*, at para. 42, 43 and 45.

20. Finally, the carriage of an employee claim through the grievance process to arbitration also consumes collective resources. Labour-management meetings occupy the time of paid representatives and distract volunteers from other activities. Arbitrators command large fees and the services of lawyers, who frequently appear as counsel at hearings, are expensive.

These costs are borne not by a grievor, but by a trade union, or, more accurately, union members. See *Ford Motor Company of Canada, supra*, at para. 42.

21. In deciding the fate of a grievance, a union official must weigh these group concerns against the interests of the grievor. The force of a grievor's claim will vary greatly from one case to another. The benefit sought by a grievor may range from a few hours' pay in compensation for a missed overtime assignment to continued employment. An employee who is terminated is deprived of not only wages, but pension contributions, welfare benefits, and seniority rights, and severance will often cause emotional trauma and social upheaval as well. The force of an individual's assertion of a contractual right also depends upon the degree of support which a grievance finds in both the facts and contractual language which may be highly specific, but frequently is as open-textured as a clause permitting discharge only for just cause. The greater the merit of a grievance, the higher is the probability that it could be won and that an employee is prejudiced if it is dropped. Moreover, contractual rights may give rise to a reasonable expectation of a contractual advantage and expectation often leads to detrimental reliance. For example, a person who is in line for a merit increase may decline an offer of other employment. Finally, the past practice of a union may add weight to an employee's claim to enforce a collective agreement. A union which has previously arbitrated all disputes of a certain type – for example, discharge cases – but subsequently abandons such as grievances, violates the notion of equal treatment. Past practice which is known to an employee generates an expectation of continuity. See generally *Rayonier Canada (B.C.) Ltd.*, [1975] 2 Can. LRBR 196 (B.C.) at 204; *Prinesdomu, supra*, at para. 27; and *Barber Coleman of Canada Ltd.*, [1976] OLRB Rep. Oct. 13, at para. 17; [1977] 1 Can. LRBR 182, at 187.

22. These are the conflicting individual and collective interests that arise when a decision is made whether or not to press a grievance. To avoid being arbitrary, a union official must consider the relevant factors and engage in a "rational" process of decision-making: see *Prinesdomu, supra*, at para. 25. Such an approach to labour board review entails a high degree of deference to bargaining agents. Legal restraint is amply justified because a trade union is better able than a labour relations board to reconcile competing job interests, to ration the limited capital of the grievance settlement process, and to allocate group funds. These are essentially political tasks not amenable to legal regulation. In the words of Archibald Cox:

When the interests of several groups conflict, or future needs run contrary to present desires, or when the individual's claim endangers group interests, the union's function is to resolve the competition by reaching in accommodation of striking a balance. The process is political. It involved a melange of power, numerical strength, mutual aid, reason, prejudice, and emotion. Limits must be placed on the authority of the group, but within the zone of fairness and rationality this method of self-government probably works better than the edicts of any outside tribunal. (*Law and the National Labor Policy*, (1960), at 83 to 84.)

IV

23. To this point, the focus has been on a disappointed grievor who contends a union wrongly decided his or her contract claim was outweighed by countervailing group concerns. What about a complaint that a union official failed to exercise proper care when investigating

or advocating a grievance? A variety of mistakes may occur in the context of contract administration. Overlooking an important fact, or misinterpreting a contract clause, may distort an assessment of the merit of a grievance. Errors may be committed in the course of presenting a case to either management or an arbitrator. A common failing is to file a grievance after a contractual time limit has past. An employee who complains of any of these faults does not contest a union's authority to balance individual and collective interests. In this setting, the union has made no such determination and, indeed, may wish to pursue the complainant's grievance, but be barred by a misguided settlement of expired limitation period. Even an attack upon a union's decision to drop a grievance that is wrongly believed to have little chance of being won, is directed at a mistake of fact or interpretation, not at the weight assigned to competing concerns.

24. How has the prohibition against arbitrary conduct been applied in this context. In *Prinesdomu, supra*, at para. 26, the Board equated arbitrary with "perfunctory" and distinguished arbitrariness from "mere errors in judgement, mistakes, negligence and unbecoming laxness".

25. There are good reasons for holding a bargaining agent responsible for perfunctory conduct by its officials. Most important, the exclusive authority of a union precludes an employee from completing many of the tasks involved in processing a grievance. An individual cannot insist that his view of either the facts or the meaning of the collective agreement be accepted by a union official who is empowered to decide what grievances are to be arbitrated. The decision to arbitrate is not the only aspect of contract administration which exclusivity removes from an employee's grasp. The limitation periods contained in many collective agreements can be satisfied only by a grievance filed with the authority of a bargaining agent, so that an individual cannot stop the running of time by initiating a claim. Deprived of the power to safeguard their own interests, employees should be protected against abuses of a union's authority. Trade union liability can be grounded upon another base. Union officials are held out, by a bargaining agent, to be versed, to a greater or lesser degree, in contract administration, so that employees rely upon them to handle grievances properly. An individual who is vaguely cognizant of a time limit may not bother with it because a union official undertakes either expressly or implicitly, by taking control of a grievance to attend to the matter. This type of reliance is reasonable and should be protected. Moreover, the services offered by a trade union are not gratuitous, as almost all employees pay for this assistance through union dues. The law helps a union to collect membership fees by enforcing union security clauses and by requiring an employer to agree to insert an agency shop clause in a collective agreement. The payment made by an employee for the assistance of a union, especially forced payment, also justifies holding a bargaining agent liable for mistakes which ought to have been avoided. For all of those reasons, a loss arising out of perfunctory conduct should be lifted from the shoulders of an individual and shared among all union members.

26. The perfunctory standard must be elaborated with sensitivity both to the character of particular union officials and to the nature of the chores they perform. In *Ford Motor Company of Canada, supra*, at para. 40, a distinction was drawn between full-time officials with extensive experience in grievance processing and employee volunteers who help out with contract administration in their spare time. As a general rule, the behaviour of a union representative should be judged by reference to the conduct of a reasonable person with a similar background. Any other approach would drastically curtail the freedom of union members – to decide not only who they wish to represent them but also how much money they want to

contribute to contract administration – by permitting a labour relations board to second guess their determinations. So long as all employees in the same circumstances receive equal representation, there is little danger that leaving the choice of representatives in the hands of the collective will lead to the derogation of individual rights.

27. The tasks carried in the course of contract administration are as disparate as union officials. In some contexts, the appropriate course of action is manifest. As a grievance ought to be processed in conformity with time limits, a failure to do so is obviously an error, and violates section 68 if attributable to a lack of proper care. But the correct course to follow is not always so clear. Assessing the probability that a contract claim would be allowed by an arbitrator is an undertaking that readily lends itself to differences of opinion, due to the vagaries of interpreting contract clauses and of proving facts. For this reason, a labour relations board should not lightly conclude that a bargaining agent's assessment of the merit of a grievance is wrong, let alone caused by perfunctory behaviour. See *DeHavilland Aircraft of Canada Ltd.*, [1979] OLRB Rep. Oct. 933, at para. 17.

V

28. The tasks performed by union officials and the legal duty by which their conduct is judged have been described. The complaint at hand raises another aspect of the duty of fair representation. The complainant contends he was legally entitled to attend meetings of labour and management representatives. A bargaining agent's claim to ultimate control over the grievance process has long been recognized. But does the duty of fair representation constrain this authority by granting a grievor a right to attend grievance meetings?

29. In *Chrysler Canada Limited*, [1982] OLRB Rep. Oct. 1417, at para. 31, the Board answered this question in the negative:

Moreover, I find, as a fact, that it is not the practice of the union and employer to have the grievor present when the grievance is being discussed with company representatives, nor is that practice unreasonable. Persons familiar with the litigation process will know that settlement discussions can often proceed more productively in the absence of the aggrieved individuals, and this is most likely to have been true in the complainant's case. The complainant was in no mood to compromise or co-operate and his presence would likely have only inflamed the situation. Certainly, I do not think a violation of section 68 can be grounded upon a long-standing practice wherein the parties to the collective agreement choose to pursue settlement discussions in the absence of the grievor. There is nothing arbitrary about that practice, nor was there any bad faith or discrimination in following it in Dwyer's case.

The same tack was taken by the British Columbia Labour Relations Board in *Cowichan District Hospital*, (No. 56/76) and by the United States Court of Appeals for the Sixth Circuit in *Whitten v. Anchor Motor Freight*, 90 LRRM 2161 (1975).

30. We concur in the result reached in these decisions. As this Board observed in

Chrysler Canada Limited, supra, the presence of an aggrieved person may impair the settlement process to his or her disadvantage. But there is an additional reason for excluding grievors from grievance meetings. The collective interests effected by the disposition of a grievance have been outlined above. The presence of the grievor may unduly inhibit a union's efforts to arrive at an accommodation that strikes an appropriate balance between the collective and the interests of the individual. In most cases, these two concerns together will outweigh the benefit which might flow from the presence of grievors – including the psychic satisfaction of participation and any information which employees may offer about their own situation. In short, a general practice of not admitting grievors to grievance meetings cannot be said to be arbitrary, except perhaps in exceptional circumstances. Nor can a practice that is generally followed be discriminatory or in bad faith. However, to conclude that a grievor is not entitled to be present does not imply that he or she need not be consulted in advance of such a meeting and later be informed of what transpires there. In addition, a union which usually invites grievors to participate in the grievance process may be called upon to demonstrate that any departure from this pattern is not arbitrary, discriminatory or in bad faith.

VI

31. Was the duty of fair representation violated in the case at hand? Mr. Westermann asked to be notified of all grievance meetings, and he did not attend at least one. But the evidence does not disclose whether or not he was invited to this meeting and declined the union's offer. If an invitation was extended and rejected, he would have no complaint. As Mr. Westermann failed to call any evidence to establish that this did not occur, his absence from one meeting does not constitute a breach of section 68. However, the outcome would probably have been no different if the union was proven to have excluded the complainant, even though in this collective bargaining relationship grievors are sometimes permitted to attend grievance meetings. The record demonstrates that Mr. Westermann is prone to antagonistic behaviour – conduct that was not always in his own best interests – which would have provided justification for treating him differently than other employees.

32. The union's failure to arbitrate the complainant's grievances cannot be described as discriminatory or in bad faith. Was the union's conduct arbitrary by reference to the analytical framework set out above? The assessment that the grievance relating to the letter of February 5th would not be won at arbitration, under any of the articles cited in the grievance, was not perfunctory. How the letter could violate the management rights clause is hard to imagine. The right to be accompanied by a union representative, set out in Article 8.01, applies only to employees who are suspended or discharged, not to those who are presented with letters. The grievance did not refer to the clause permitting discipline only for just cause, but, even if this protection had been invoked, there would have been a substantial risk of losing at arbitration, as the letter may no longer have been disciplinary in nature after the warning was deleted. Nor was the interest balance struck by the union unreasonable. Even if Mr. Westermann had been assured of success at arbitration – which he was not – he stood to gain very little, as the allegations to which he objected had been struck from the letter. On the other side of the ledger, pursuing this grievance would have seriously impaired the informal settlement process. Remember that the union had succeeded in removing the warning from the letter, and the employer subsequently deleted all references to rotten eggs. Despite his earlier statement that this remedy would be acceptable to him, Mr. Westermann then demanded the complete withdrawal of the letter. By changing his position in this way, Mr. Westermann

was not acting in good faith. Common sense dictates that one ought not to put forward increased demands after the other side has agreed to proposals made at an earlier date. Engaging in this type of conduct is almost certain to ensure that the party opposite will be reluctant to make concessions in the future. The union's refusal to assist Mr. Westermann after he elevated his demands is hardly surprising. The union was justified in refusing to expend its members resources to arbitrate the grievance.

33. In the second grievance, Mr. Westermann alleged that the employer had contracted out work in contravention of Article 10.03. The employer responded that what had occurred was technological change, permitted by Article 10.04; the union agreed. Was this interpretation of the collective agreement perfunctory? The notion of contracting out might be understood to connote an arrangement whereby the services previously performed by employees covered by the collective agreement are transferred to persons working for another employer. Under this definition, work would be contracted out if the hospital arranged for a local bake shop to supply baked goods produced "from scratch" by bakers performing tasks the same as, or similar to, the work that had been done by the hospital's own employees in the past. In this example, the people doing the work have changed, but the work processes have remained substantially the same. Work has been contracted out in the sense that the same, or similar, work is still being performed, only by different people. But in the situation at hand, there has been a dramatic change in the process by which baked goods are produced. Goods which were previously prepared from basic ingredients by a hospital baker are being produced through the combined efforts of people employed elsewhere to manufacture mixes and frozen products and hospital employees who turn these prepared foods into a finished product. Obviously, the assignment of these new tasks to hospital employees does not involve the contracting out of work, and the same might be said about the processes being carried out outside the hospital. This alteration in the method of production might be labelled as a technological change rather than as the contracting out of work, especially under a collective agreement like this one which draws a sharp distinction between contracting out and technological change. To view the collective agreement in this way is not perfunctory. Adopting this interpretation, the union decided that the complainant's interest in pursuing the grievance was outweighed by competing concerns. Mr. Westermann faced reassignment to a housekeeping job. Against this hardship, the union had to weigh the expenditure of funds on a case that might well be lost. The decision made was not unreasonable.

34. The grievance relating to a skilled trades rate had absolutely no basis in the collective agreement. There is no such premium and Mr. Westermann has always been paid the amount fixed in the contract. The union's decision not to arbitrate this grievance cannot be challenged.

35. The complaint is dismissed.

0746-82-M I.B.E.W. Electrical Power Systems Construction Council of Ontario and International Brotherhood of Electrical Workers, Local 1788, Applicants, v. Ontario Hydro Respondent

Constitutional Law – Construction Industry Grievance – Practice and Procedure – Employer refusing to hire person referred by union to non-nuclear work sites – Just cause clause not applicable – Union having onus – Employer meeting collective agreement obligation to assess person “reasonably, in good faith and without discrimination” – Employer conduct not breach of Charter rights – Discussion of application of Charter to crown corporations

BEFORE: George W. Adams, Q.C., Chairman and Board Members W. H. Wightman and F. S. Cooke.

APPEARANCES: *S. B. D. Wahl, Richard P. Lawlor, J. W. Mulhall and William Gilroy for the applicant; and R. Ross Dunsmore, G. A. Mackie and W. S. O'Neill for the respondent.*

DECISION OF THE BOARD; February 27, 1984

1. This is a continuation of File No.: 0746-82-M together with File Nos: 1541-82-M and 1542-82-M. All three matters were consolidated by order of the Board, September 20th, 1983. In this respect the Board ruled:

Having regard to the submissions of the parties, the Board has decided to hear the two outstanding grievances (File Nos: 1541-82-M and 1542-82-M) by consolidating them with File No. 0746-82-M. The Board will permit both union and employer to call whatever additional evidence they wish with respect to the non-nuclear referrals bearing on File No. 0746-82-M. Mr. Cooke dissents on the basis that the employer has closed his case with respect to the non-nuclear sites referred to in the Board's decision of January 24th, 1983. Mr. Wightman dissents on the basis that the Board in 0746-82-M was dealing only with the nuclear Pickering site.

2. Many of the background facts are set out in the Board's decision of January 24th, 1983 [Now reported at [1983] OLRB Rep. Jan. 99]. In that decision the Board found that the respondent employer had not acted in a discriminatory, arbitrary or unreasonable manner in refusing to hire Mr. William Gilroy upon his referral by the trade union to various nuclear construction sites in the Province of Ontario. Internal memoranda issued by the respondent's security division outlined its understanding of the facts causing it to act as it did with respect to rehiring Mr. Gilroy. One memorandum is dated February 25th from J. H. Kearns, Security Co-Ordinator, Security Division to "All Security Officers, Business Administrators/Supervisors, All Thermal Stations and NPD-GS". It reads:

Ontario Hydro Employee Voluntarily Terminated

The following is submitted for your information.

On Friday, February 5, 1982, William Gilroy, age 36 years, DOB February 27, 1945, SIN #432 704 575, 82 Ventura Drive, St. Catharines,

Ontario, voluntarily terminated his employment with Ontario Hydro at Pickering NGS "B", Construction.

He was employed there as an electrician, and previously worked on construction at Lakeview GS, Nanticoke GS, Southern Zone Construction, Pickering NGS "A" and possibly other locations. Gilroy is currently President of IBEW, Local 1788.

During the weekend of February 6 and 7, 1982, Gilroy was one of five Irish Nationals arrested while crossing the border from Canada into the United States. Two other Canadians arrested were William O'Neill, age 26, and James Kelly, age 42, both from St. Catharines, Ontario. The three Irish Nationals were ordered to be temporarily removed from the U.S. without an immigration hearing. Gilroy, O'Neill and Kelly, all landed immigrants, were returned to Canada, after posting bail of \$5,000 to appear in the United States on charges under the immigration law of aiding and abetting to illegally enter the country, using false statements, plus criminal charges.

Immigration officials said after the arrests, they seized a shopping list of guns and ammunition to be bought in the United States. All charges occurred outside of Canada.

In a subsequent U.S. federal district court hearing, Gilroy admitted that he had been sentenced to two years in 1975, after pleading guilty to conspiracy to export arms to the Irish Republican Army. Gilroy served his sentence from June, 1975, until his release in October, 1976.

Attached are photocopies of four newspaper clippings taken from the Globe and Mail, The Toronto Sun and Toronto Star.

You may wish to discuss this with your staffing officers.

For further details, contact the Criminal Investigations Section, Security Division.

3. A selection of newspaper accounts of the grievor's arrest are reproduced in the Board's earlier decision.
4. A subsequent memorandum to Mr. G. T. Leader, Manager of Construction, from Mr. G. Kileeg dated June 17, 1982 reads:

William Gilroy - Electrician

We understand that the above person, who has been employed by Ontario Hydro previously, is seeking to return to work at Pickering NGS "B" Construction site. Attached is a copy of his work record with Ontario Hydro.

We strongly recommend that this person not be employed at Pickering "B" site as we consider him an unsuitable employee and a security risk.

In 1975 Mr. Gilroy was charged and convicted of conspiracy to export arms to Ireland via the USA. The attached news clippings confirm this. A transcript of the trial has been requested.

From June 27, 1975, to October 25, 1976, Mr. Gilroy spent in the Mimico correctional centre. His original sentence was two years less one day. He was refused temporary absence privileges.

On February 6, 1982, the day after he voluntarily terminated his work at Pickering "B", he and four others were charged by US Immigration authorities with conspiracy to smuggle aliens into the USA. We understand that William Gilroy, William O'Neill and James Kelly are landed immigrants of Irish descent. The other two, Edward Howell and Desmond Ellis, are Irish nationals.

In addition, Gilroy, O'Neill and Kelly were charged with two counts each of smuggling aliens (ie, the Irish nationals). Gilroy, O'Neill and Kelly were returned to Canada after posting bail of \$5,000.00 to appear in Court in the US on a date to be set. As of this date these charges are still pending in the USA and no definite court date has been set. We are informed that the US authorities have not dropped the charges and intend to proceed with court action in all cases concerning Gilroy, O'Neill and Kelly.

Howell had posted bail in the US, was returned to Canada and was ordered deported. He escaped from Canadian authorities at the Paris airport and turned himself in at Dublin, Southern Ireland. Ellis is apparently still in Erie County correctional institute seeking political asylum.

Inasmuch as Mr. Gilroy has been found in the company of persons suspected of an arms-buying mission for the Irish Republican Army and has been charged by US authorities, it appears that he may be continuing in unlawful activities, similar to those he was convicted of previously in 1975. Mr. Gilroy has not demonstrated to his former employer and the public that he is refraining from questionable and perhaps unlawful activities. As a result, the subject person should not be employed in a Regular or temporary position with Ontario Hydro.

Ensuring the suitability of our employees, including reliability, is one of the measures taken by Ontario Hydro to provide effective security. This is even more important at our nuclear facilities.

5. The actual charges laid against the grievor are set out in documents reproduced in the Board's earlier decision.

6. By letter dated November 3rd, 1982 Mr. J. W. Mulhall, Business Manager of the

complainant trade union wrote to Mr. William O'Neill, Manager, Construction Labour Relations, Electrical Power Systems Construction Association. The letter reads:

Dear Sir:

Re: Collective Agreement between the Electrical Power Systems Construction Association and International Brotherhood of Electrical Workers, Local 1788 effective May 1, 1982 until April 30, 1984

Re: Collective Agreement between the Electrical Power Systems Construction Association and the I.B.E.W. Electrical Power Systems Construction Council of Ontario effective from May 1, 1982 until April 30, 1984.

I.B.E.W. Electrical Power Systems Construction Council of Ontario and I.B.E.W. Local 1788 consider William Gilroy a reliable, certified and competent Union Member.

This letter serves as notice to Ontario Hydro and E.P.S.C.A. that William Gilroy is, from on and after October 1, 1982

1. referred to employment by I.B.E.W. Local 1788 following each and every request for certified tradesmen whenever made, throughout the Province of Ontario;

and

2. referred to replace travel card members and/or permit holders wherever employed by Ontario Hydro throughout the Province of Ontario

pursuant to the terms and conditions of the Collective Agreement referred to above.

Failure to hire William Gilroy pursuant to this province wide referral three working days from the date hereof is recognition that Ontario Hydro and E.P.S.C.A. consider William Gilroy ineligible and unsuitable for employment throughout the Province of Ontario. This constitutes an unjustified refusal of employment, termination, discipline or discharge contrary to the Collective Agreement.

By letter dated February 16th, 1983, Mr. G. A. Mackie, Director of Transmission Systems, replied. He wrote:

Dear Mr. Mulhall:

I have been advised by Mr. W.S. O'Neill of your intention to refer Mr. Gilroy for employment as an electrician into the Lines and Stations Division of Ontario Hydro. As the senior officer responsible for this division, I have reviewed the recent decision of the Ontario Labour Relations Board respecting Mr. Gilroy and I have reviewed the material which our organization has secured concerning him and I have considered the risks inherent in hiring someone of Mr. Gilroy's circumstances.

The facts indicate a continuing involvement by Mr. Gilroy with persons suspected of unlawful activity which could be job related. Therefore, I am satisfied that the degree of risk involved in hiring him into Lines and Stations is sufficient to justify refusing to hire Mr. Gilroy at this time. This conclusion is supported by Mr. Gilroy's continuing failure to explain his conduct and the inherent public interest involved.

7. As set out in our earlier decision, the grievor, Joseph Myles, Robert Gray, and Philip Kent were convicted in 1975 of conspiracy to export or attempt to export from Canada goods (military arms) included in an export control list, contrary to section 13 of the *Export and Import Permits Act*, thereby committing an indictable offence contrary to section 423(1)(d) of the *Criminal Code of Canada*. Myles and the grievor received imprisonment sentences for two years less a day and Mr. Gray and Mr. Kent received somewhat lesser punishments. Myles, Gray, Gilroy and Kent pleaded guilty to the charge for which they were convicted. A transcript of the 1975 criminal proceedings was introduced into evidence. The transcript contains a recitation of facts by an officer of the Royal Canadian Mounted Police which was accepted by the grievor's counsel, Mr. A. Maloney, as correct. This is the transcript referred to in the internal security memorandum of the respondent dated June 17th, 1982 and reproduced above.

8. Mr. Stewart Shearer, an officer of the Royal Canadian Mounted Police, was examined by Mr. Duffy for the Crown as follows:

MR. MALONEY: I have no objection to this, Your Honour, provided that a copy of the summary which my friend has given to me, that would assist you in listening to the evidence.

MR. DUFFY: Q. Would you start the summary and go through it and tell us what happened to substantiate these charges?

A. Yes, sir. During 1973 and early 1974, it came to the attention of the RCMP in Toronto that arms were being shipped from Toronto area and these arms were ending up in certain places in Ireland.

An investigation was instituted in an attempt to identify the persons responsible for these illegal shipments. As a result of intelligence gained from this investigation, a meeting was held at the RCMP Headquarters on the 17th of June, 1974 which I attended.

As a result of information obtained at that meeting I, along with other

principals, conducted a surveillance at the rear of 100 Doncaster Avenue, Toronto.

A. During the course of this evening, the evening of the 17th of June, 1974, persons who subsequently have been positively identified as the two accused, Mr. Gray and Mr. Gilroy, sitting third from the right and Mr. Gray, fourth from the right in the inside seat – not gowned – the Court official on the right.

These, the persons, Gray and Gilroy at this time were observed and actually photographed receiving a shipment about, later determined to be, 15 semi-automatic military rifles. These rifles were subsequently seized and they were found to be, the normal name of them was called L 181 semi-automatic. They were a military rifle for use; 7.62 calibre, my information.

Q. Well, who would normally use this kind of weapon?

A. They are normally used by the military of various countries.

These rifles were subsequently packed in boxes at this location and additional surveillance was maintained on these boxes of rifles, that is, the date of 17th of June, 1974 until approximately 6.25 p.m., when they were seized in the possession of the accused, Mr. Myles. The accused sits between the gentlemen in the grey suit and the blue suit, second from the left.

Q. Between Windsor and Detroit, that is the Ambassador Bridge, between Windsor and Detroit, I understand that he was driving a vehicle across the bridge and the vehicle contained the arms at that time?

A. That is correct.

Q. And he was stopped?

A. That is correct, and he was stopped and arrested in possession of these arms on the 1st of July, 1974 at 12.31 a.m.

During the surveillance period from the 17th of June to the 1st of July, '74, this shipment of arms was observed by members of the RCMP to pass from the hands of Gilroy and Gray to the accused, Philip Kent, who is sitting second from the right in the accused's seats.

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Investigation, both prior to, and subsequent to, the actual seizure revealed packages and documents which indicated with absolute certainty that the final destination of this shipment of arms was intended to be Ireland and also that the identification has confirmed extensive linkage between the accused men and the documents, as follows:

There is a statement by the accused Gray to his employer, Howard

Sandy of the Stage Door, 100 Doncaster, that he was constructing a wooden box at that address to ship arms to Ireland in. Joseph Myles, who obtained a shipment of arms directly from the accused Kent was an Executive Officer of the Irish Northern Aid.

Q. I believe that is an American organization?

A. Yes, it is and in fact, he was Treasurer of the Irish Northern Aid Committee, Detroit Chapter.

The accused, Mr. Myles' name, address and telephone number were in the possession of the I.R.A. which stands for Irish Republican Army - as Staff Sergeant, who was arrested in 1973 by the Irish Federal Police.

There is a document from the Michigan Bell Telephone that shows in May of 1974 a telephone call was placed from Mr. Myles' residence in Livonia, Michigan which is near Detroit, to that of Kent's residence in Tavistock.

There is documentary evidence that on January 18th, 1974, American Airline tickets were issued from Detroit to New York for a J. Myles and Gillian (sp) Kent. The one day after that trip to New York by Kent and Myles an amount of \$2,000 in U.S. funds was deposited by Philip Kent to a bank in Stratford, Ontario. And on that date he wrote four cheques in the amount of \$500 each in the name of Lena Gilroy, wife of the accused, Mr. Gilroy.

Mr. Gilroy stated that he received this money, not his wife.

During May and June, five telephone calls were made from the residence of Gillian Kent and the residence of Myles. Articles seized during the search of Philip Kent's residence subsequent to the seizure revealed a connection between Kent and the Irish Northern Aid in the form of books, a banner, and other documents. Certain photographs were taken, the surveillance on the shipment, and also photographs of other articles, items seized during the course of the investigation.

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Photograph No. 2 is also of Mr. Gilroy, a back view.

Photograph No. 3 is a photo of Mr. Gilroy receiving packages.

Photograph No. 4 also shows Mr. Gilroy, vaguely, in the warehouse door.

No. 5, this is a rear view of the accused Gilroy handling what later proved to be rifle box, and the butt of one of the rifles is visible.

Photo No. 6, this is a photo taken in order to get all the warehouse door.

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A. In the sequence, by these photographs, rifle boxes were unloaded, taken inside and then the empty boxes go out and were thrown in the garbage container.

Photograph No. 10, or, No. 12, pardon me, is more, another load of

empty rifle boxes being thrown in the garbage containers.

Q. But these were boxes that the rifles were originally in and they were placed in those boxes at 100 Doncaster; is that what happened?

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Photograph No. 21 is a photograph of items also seized from the Kent residence which includes an Irish Republican Army, "Irish People" newspaper and photos.

Photo No. 22 is a photo of a box seized from the residence of Philip Kent. It states "Philip Kent, 1973, In appreciation for your benevolence, Northern Aid for Irish Freedom.

MR. DUFFY: Those are the facts, Your Honour, on which the Crown relies to support the plea of guilty as entered by the accused.

THE COURT: Mr. Maloney, are those facts substantially correct?

MR. MALONEY: Yes.

THE COURT: These convictions are based on the plea of the four accused and having heard the facts, convictions will be registered against these four.

It was also the Crown's position that Myles and Gilroy were the "front line of this conspiracy" and the sentences rendered by the court reflected this greater responsibility.

9. Mr. Gilroy was extensively cross-examined on this transcript under the protection of the Ontario and Canada Evidence Acts. He admitted to having been charged with conspiracy to export arms without a licence and to pleading guilty to that charge. He was in Court when all of the above was attested to. He, however, denied knowing rifles were involved and the money he received was, he said, the repayment of a loan made to Mr. Kent. He said he pleaded guilty on being advised by Mr. Arthur Maloney that "an Irish Catholic with guns had no chance in this Province". He denied knowing where the guns were going. He admitted his attendance at 100 Doncaster but denied knowing what was in effect in the United States. He is also an elected state representative. He testified that the Irish Northern Aid He said he knew Messrs. Gray and Kent but not Mr. Myles. He testified that he did not realize he and Myles were viewed as leaders although he heard Mr. Duffy say this and saw no point in objecting. He could not recall any reference to the I.R.A. during the proceedings.

10. Apparently in response to references in the transcript to the Irish Northern Aid, the union called Mr. Richard P. Lawlor, an attorney practicing in Hartford, Connecticut in the United States. He is also an elected state representative. He testified that the Irish Northern Aid is a humanitarian organization headquartered in New York City with the purposes of (1) raising funds to send to families of political prisoners and (2) informing the American public about the problem in Northern Ireland from an Irish Nationalist viewpoint. Mr. Lawlor is the publicity chairman for the north-east United States and a spokesman for the Hartford unit. He testified that the organization is not connected with violence and does not send money to the I.R.A. He knew of no connection between Mr. Gilroy and the Irish Northern Aid and he

knew of no violent act in the United States or Canada committed on behalf of Irish Nationalism. He testified that such violence would impede the development of greater sensitivity in North America to Irish Nationalism and to the bringing of pressure by Canada and the United States on the United Kingdom.

11. Board File No. 0746-82-M deals with a grievance filed by the complainant with the respondent dated July 5th, 1982. In this grievance it was alleged that the respondent from on and after June 17th, 1982 "and continuing to date" had violated the collective agreement between the complainant and the Electrical Power Systems Construction Association by refusing to employ Mr. Gilroy as a reliable and competent union member and by refusing to hire him as a replacement for permit holders or travel card members after three working days' notice. In this grievance the location of the violation was said to be at the Pickering Generating Station. The collective agreement in question pertained to construction in relation to generation projects. The recognition provision of this agreement provides:

EPSCA recognizes the union as the exclusive bargaining agency for a bargaining unit as defined in Item B engaged in all construction industry work performed in the Province of Ontario on Ontario Hydro property for the "Generation Projects Division of Ontario Hydro". This work includes the building of generating stations, hydraulic works, heavy water facilities, microwave and repeater stations, but excludes the building of commercial type office facilities at urban locations remote from operating facilities.

12. During the first set of hearings leading to the Board's decision of January 24th, 1983, and over the objection of counsel for the respondent, evidence was entertained of the refusals by the respondent to hire the grievor when referred to a number of locations subsequent to the refusal at Pickering, the only specific refusal mentioned in the grievance. This evidence was given by Mr. Joseph Mulhall, Business Agent for IBEW Local 1788. These other locations included Bruce Generating Station (July 9th, 1982); Lakeview Generating Station (October 7th, 1982); Darlington Generating Station (October 19th, 1982); the Southern Construction Zone of Ontario Hydro for work at the Hamilton Lake Transformer Station, Sir Adam Beck Generating Station, Cherry Wood Transformer Station and Stde the development of greater sensitivity in North America to Irish Nationalism and to the bringing of pressure by because it followed the filing of a grievance in point of time. Counsel for the applicant argued that events following a discharge can be relevant and in this respect it was submitted that the other refusals to employ the grievor at both nuclear and non-nuclear sites demonstrated a complete "blacklisting" of the grievor and not a determination restricted to nuclear power sites. The Board reserved on the relevance of the subsequent refusals and permitted the applicant to adduce testimony with respect to other locations provided further particulars were provided to the respondent. Ultimately, these subsequent refusals lead to Mr. Mulhall writing his letter of November 3rd, 1982 to Mr. William O'Neill of the respondent in which he made an open province-wide referral and replacement offer on Mr. Gilroy's behalf. In turn, Mr. Mackie rejected this offer by letter dated February 16th, 1983 reproduced above.

13. While evidence was admitted under reserve with respect to the subsequent refusals, the trade union filed two additional grievances (No. 1541-82-M and No. 1542-82-M) pertaining to all of the refusals including the Pickering Generating Station. In effect, the situation

was unfolding for the applicant trade union as it was litigating its initial grievance (No. 0746-82-M) and it was not clear that the Board would treat the subsequent refusals as, in themselves, the subject matter of the first application. Indeed, the panel hearing the first complaint refused to consolidate the two subsequent referrals or to entertain those referrals within the context of the initial grievance. As it turned out, the Board confined its first decision to the nuclear sites and made only passing reference to evidence indicating refusals at a number of non-nuclear sites. By our direction, set out in paragraph one of this decision, we were making clear that our first decision was not aimed at resolving the refusals to hire at non-nuclear sites and that we were willing to entertain whatever additional evidence the parties wished to call in relation to these sites. Accordingly, it is the subsequent refusals at non-nuclear sites occurring against the background of the grievor's earlier conviction in 1975 and the most recent incident in 1982 that are the subject matter of this decision.

14. William Gilroy is 38 years old; married; and has two children. He is a landed immigrant and President of IBEW Local 1788. He has held that position for two years and the local has a membership of approximately 1300 tradesmen. His employment history is set out in the Board's earlier decision of January 24, 1983 at paragraph 4. He testified that he was apprehended at the United States border at Niagara Falls, N.Y. and subsequently charged by American authorities with conspiracy to bring aliens into the United States. He said this was a felony charge which was later reduced to a misdemeanour charge to which he pleaded guilty on the assurance from his own lawyer that there would be no more time to serve other than the two weeks of incarceration following his arrest. He stated that the judge called his involvement a "foolish escapade". However, he testified that in actual fact he had no involvement in the conspiracy to bring Desmond Ellis and Edward Howell into the United States. The hearing and sentencing with respect to his 1982 arrest occurred in March of 1983. Thus, the matters were still before the courts in the United States at the time of the Board's original decision and related hearings.

15. On February 6th, 1982 at approximately 6:00 p.m. Thomas J. Algoe, an inspector with the United States Customs Service, was requested to do a customs secondary vehicle inspection on a vehicle driven by William O'Neill, a 1976 Plymouth Fury with Ontario Licence #LDU 672. This car belonged to the grievor. William O'Neill is a friend and neighbour of the grievor. There were two other occupants in this car who identified themselves to Algoe as William McKee and Michael Gilmore. All three men gave negative customs declarations orally and the result of the vehicle search was negative. They all said that they were going to Pete's Market in Niagara Falls, New York. The ownership information on this car was given by Algoe to immigration officials who determined that the owner of the vehicle had a "look out" information on him as possibly smuggling weapons or people. Subsequently, it was determined that the two persons identifying themselves as McKee and Gilmore were carrying false documentation and that in fact they were Edward Howell and Michael Ellis respectively. On completing this secondary inspection, and at approximately 6:20 p.m. Algoe was requested to do a customs vehicle search on a 1975 Ford bearing Ontario Licence Plate #SPO 019 driven by a James M. Kelly. The only other occupant of this vehicle was the grievor, William Gilroy. Both Kelly and Gilroy gave Algoe negative oral customs declarations. All five men were placed in a space 15 feet by 15 feet and were asked if they knew each other and the response was that they did not. Algoe was then asked to do a secondary examination of the second car. Prior to doing this, Mr. Kelly and Mr. Gilmore were asked if they had anything to declare; if were they importing anything; and did they have with them money in excess of \$5,000.00. Both men gave a negative response. Underneath the front passenger seat of Mr.

Kelly's car Mr. Algoe found a bundle of documents and books held together by a rubber band. The bundle contained a wallet of Edward Howell which contained 900 pounds sterling; a couple of address books; two airline tickets; a brown envelope addressed to Michael Weir containing a yellow notebook and several other documents; a bundle of 83, 50 pounds sterling notes wrapped with a rubber band; and a small note describing what appeared to be various types of firearms. Overnight bags were found in the back seat and in the trunk of Mr. Kelly's car. One of the bags contained a chequebook and bankbook of J. McCafferty and Irish passports of Robert Murray, Edward Howell, and Michael Weir. Kelly claimed one of the bags and Howell claimed ownership of another of the bags in Kelly's car. No one claimed ownership of the bundle of documents and money found under the front passenger seat of Kelly's car where the grievor had been sitting. The currency of 4,150 pounds sterling was never claimed. Nor did Howell claim ownership of any of the items listed above and found either under the grievor's seat or in the bags found in the car he was riding. Both Kelly and the grievor told Algoe they were going to Pete's Market for dinner. The only article Howell claimed was his passport. Algoe testified that once Howell admitted to the ownership of the bag found in Kelly's car there was a feeling in the room that the individuals knew each other.

16. Before this Board, the grievor denied having anything to do with the attempt by Ellis and Howell to obtain entry into the United States unlawfully. He testified that he never saw a shopping list of arms and that it was coincidental that both vehicles used the same bridge and attempted to enter the U.S. within a short period of time of each other. He stated that his friend William O'Neill had asked to borrow his car and that he did not know the car would be used to transport Ellis and Howell into the United States. The grievor testified that he quit Ontario Hydro on February 5th in order to take a job in St. Catharines where he lived and where he could be closer to his wife who was expecting a baby. He was to commence employment as an electrician at the Port Weller shipyard the following Monday. This had been arranged through the union office the week before and the work at Port Weller has nothing to do with Ontario Hydro or the collective agreement under which this dispute arises. Kelly and O'Neill are close friends of the grievor and are from Ireland originally. They live close to each in St. Catharines. O'Neill has borrowed the grievor's car in the past and asked to use it some time during the afternoon of February 6th. He lives across the street from the grievor. According to the grievor, O'Neill did not tell him why he wanted the car. The grievor has only one car. The grievor testified that he was planning to go to Niagara Falls, New York to purchase some liquor for the upcoming birth of his daughter that same day and, after loaning his car to O'Neill, he called Mr. Kelly to take him. He testified that he and Kelly were also planning to go to Pete's Market for dinner. He agreed that this would leave his wife and child at home alone but that this had happened before. He testified that he and Kelly arrived at the border only to discover Mr. O'Neill was also there and being detained. The grievor denied that all five men were in effect travelling together. The grievor could not recall a bag in the back seat of Kelly's car and he denied knowledge of any of the other contents found in Kelly's car.

17. The grievor testified that he pleaded guilty to the ensuing charges because it was "better for everyone and we would get off with time served". Nevertheless, he was individually represented by counsel. He testified that he has no idea who is responsible for the circumstances leading to his arrest and conviction and further testified that he has not discussed the matter again with his two friends. The grievor acknowledged that while incarcerated in the United States he joined a hunger strike initiated by Howell and Ellis to protest their "inhumane treatment". In the grievor's view, it was merely coincidental that Howell and Ellis

were at the border when he and Kelly arrived. He disclaimed any responsibility for the luggage belonging to either of these men found in Kelly's car. He cannot enter the United States at this time but is appealing the decision to bar him entry. Subsequently, the grievor was referred to the Pickering Generating Station "B" and refused employment because he was "unsuitable for employment". On July 9th, 1982 the union was advised by D. J. Laut not to refer the grievor to the Bruce Generating Station project to bump out travel card electricians because the grievor was considered "unsuitable for employment". As of October 7th, 1982 Mr. Gilroy was the first available employee to be referred to work. The Lakeview Generating Station required three tradesmen. Mr. Mulhall contacted Mr. G. C. Thorne, Personnel Officer responsible for the Lakeview Generating Station, and was advised by Mr. Thorne that Mr. Gilroy was "considered unsuitable for employment by Ontario Hydro". This advice was confirmed by letter dated October 7th, 1982 from Thorne to Mulhall. Later in October Mr. Mulhall received a request for four tradesmen at the Lake Transformer Station located in Hamilton but was advised by Linda Johns that Mr. Gilroy was "considered unsuitable for employment with Ontario Hydro in the Southern Construction Zone". At about the same time there was a request for four electricians on the night shift at the Darlington Generating Station and, by letter dated October 19th, 1982, Mr. J. P. Bennett confirmed that Mr. Gilroy was "considered ineligible for employment at Darlington G. S. at this time". Employment opportunities at Sir Adam Beck Power Plant; Cherry Wood Transformer Station; and Stachen Avenue Transformer Station were also denied the grievor and for the same stated reason.

18. Under both collective agreements, i.e. the Generation Projects Construction agreement and the Transmission Systems Construction agreement, travel card holders and permit men may be bumped by regular tradesmen. Mr. Mulhall produced a table detailing the travel card holders working in Local 1788's jurisdiction (other than at nuclear sites) from August of 1982 until July of 1983. The table relates to Atikokan, Lines and Station, Miscellaneous Projects, Nanticoke, and Thunder Bay. It shows a high of 58 travel cards to a low of 11 travel cards working in the jurisdiction of the local during the period surveyed. The Atikokan location Mr. Mulhall received a request for four tradesmen at the Lake quit Ontario Hydro on February 5th in order needed. Lines and stations pertain to transmission stations and switching stations. Miscellaneous projects include a number of operational generating stations together with the Hearn G.S. which is being shut down and moth balled. Mr. Mulhall testified that the Lakeview referrals pertained to anything the plant maintenance people were unable to do or lacked the time to perform. He also described the work required at Lennox, Lambton and Nanticoke Generating Stations.

19. Mr. G. A. Mackie is the Director of Transmission Systems. He has been with Ontario Hydro 36 years. He is in charge of the design and construction of the bulk of electrical systems, i.e. the delivery system to Ontario. People who work for him do the basic engineering and anything else in connection with the construction of the electrical system or the hook-up of any related mechanical system. Electricians install underground conduit, engage in steel erection and the installation of insulators, switch gear and transformers. Inside of control rooms they install conduit, cabling, cablepan, lighting, instrumentation and relays. He testified that the Vice-President, Design and Construction and the Vice-President of Operations were aware of "the Gilroy situation". While the problem was handled at the workplace level, Mr. Mackie was aware of what zone managers were doing in that they report to him. He said he could have overruled their decisions but did not issue a global order until February 16th, 1983. This response is reproduced above. Mr. Mackie, however, has no responsibility for power sources and was not involved in refusals to hire the grievor at generating stations. He

testified that he did not speak on the issue until February of 1983 but he was aware of the decisions made by the managers reporting to him and it is fair to infer that Mr. Mackie's peers and superiors were aware of each and every refusal to hire. And like Mr. Mackie, his peers and superiors would have a veto power over these local decisions.

20. Mr. Mackie described the transmission system of Ontario Hydro in considerable detail. The reliability of this system is of the utmost concern to Ontario Hydro and the people of Ontario. To this end, the Corporation has built a redundancy into the system to provide for outages. Nevertheless, outages do occur and the system is not fail safe. He gave the example of what would happen should a small distribution station be destroyed. Ontario Hydro could span around it within eight hours but it would take a year and 4 to 5 million dollars to rebuild. If a station such as the Leaside Station were destroyed outages could last up to ten days and affect 10 to 15% of Toronto. He pointed out that blackouts in the United States had attracted looting, violence and contributed directly or indirectly to a number of deaths. Outages during the winter period could be very damaging. The Cherry Wood station was described as a particularly sensitive station in terms of its role and volume. This station would cost 131 million dollars to replace and take up to 4 years to construct. Other stations were described in similar terms. Mr. Mackie also described the previous experience of Ontario Hydro with bomb threats and other unlawful interferences with its operations. Problems of this nature have been experienced at the Saunders Generating Station, Sudbury Clairebell, Sir Adam Beck, and the Darlington Generating Station. Saunders involved a bomb threat in a bid to extort a half a million dollars. Sudbury Clairebell involved an explosive device used to blow up an oil system and put a transformer unit out of service. Explosive devices were also found at Sir Adam Beck but detected before any explosion occurred. At Darlington a tower was cut in three places causing it to sag. Ontario Hydro, the Board was advised, does not maintain a substantial security system. It does, however, react to security problems as they are identified. Mr. Mackie testified that it has never been Ontario Hydro's policy to spend large amounts of money to, in the abstract, preclude sabotage because the cost would simply be too great. For example, the security systems at transformer stations are sufficient only to "keep out a child and an honest man". Nevertheless, the Corporation does maintain its own security division and liaises with the RCMP. This division is sensitive to terrorist and sabotage activity and receives information from various police sources on such activities. From time to time the RCMP is called in for security point checks, particularly with respect to sensitive installations. Mr. Mackie indicated that a fossil fired plant like Lakeview was more at risk than many others because high duty piping leading from the boilers contain super-heated steam. If this piping ruptured for any reason, life expectancy in the immediate vicinity would be two minutes or less. He said he was "afraid" to put the grievor in any one of these plants including Nanicoke, Lennox, Lambton and Lakeview because there are weaknesses in all of them. With respect to the Hamilton Lake Transformer Station, he testified that the station was designed to provide an individual load to the Hamilton area and that it was tied into the heavy industry in that city. There are control rooms on the property and employment status would allow the grievor entry into the key buildings. On cross-examination Mr. Mackie agreed that a person without employment status could in many of these locations gain entry to the area surrounding the transformer or generating station and place an explosive which would accomplish precisely what Mr. Mackie feared. This was because of the rather minimal security precautions in place at each transformer and generating station and at other facilities of Ontario Hydro.

21. In describing why the grievor had been singled out for special security treatment,

Mr. Mackie testified that he was concerned a possibility of improper conduct on behalf of the grievor existed. He said "it [was] going to be difficult to predict what the grievor will do next". He said "requests could be made of Mr. Gilroy to take action against Ontario Hydro at some later date". He said the Corporation was "just frightened of such a possibility and that it had no right to place the people of Ontario at risk by hiring this individual". He testified that his security division has advised him of "the possibility of an exchange of favours between terrorist groups leading to even greater unpredictability in the grievor's associations". He was also advised that utilities, computer installations, and nuclear facilities are prime targets for terrorist activity. He pointed out that some terrorist acts had no purpose other than to obtain financial support such as the recent attempted kidnapping of one of the Weston family. He agreed that there are levels of risk but asked "why should Ontario Hydro take any risk?" On cross-examination, he referred to the grievor's association with "unsavoury elements". He said that one could not predict how the grievor will act in response to these associations in the future. He agreed, however, that he had no firsthand knowledge of an association of terrorist groups around the world. He agreed that the grievor was a good electrician but that his continued association with "the unsavoury" raised a sufficient doubt in his mind over the wisdom of hiring the grievor. He said that the grievor's testimony before this Board did not change his point of view. He did not believe the grievor and, based on his testimony, Mackie continued to believe that the grievor's associations could affect his work. He said that the individuals who were involved in the attempted border crossing in the grievor's car were "less than satisfactory". He testified that "in our business we cannot afford to take that chance; we would be highly criticized". In his view, Ontario Hydro made a mistake in bringing the grievor back the first time. The grievor had been given "the benefit of the doubt" after 1975 and Ontario Hydro was not prepared to do this again. Mackie testified that Ontario Hydro's reaction could well have been different had the grievor only been involved in social contact with the two men who were attempting to gain illegal entry into the United States. The same would be the case if the grievor was merely advocating an Irish nationalist point of view. However, from Mr. Mackie's perspective, the grievor's conduct to which Ontario Hydro objected exceeded mere association and involved unlawful acts committed in support of terrorist-like activities or organizations abroad. This second unlawful act represented to Ontario Hydro an objectionable link between the grievor, terrorist groups, and the security of the corporation's facilities.

22. William O'Neill is the Manager of Construction Labour Relations for Ontario Hydro and the General Manager of EPSCA. In February of 1982 he learned through news reports of Mr. Gilroy's arrest. He called the Pickering G.S. and ascertained that the grievor had voluntarily terminated his employment the previous Friday. He obtained as much background on the grievor's arrest as he could from the security division of Ontario Hydro and initiated a meeting with "senior people to discuss Bill". A meeting occurred approximately one week to ten days after the grievor's arrest. Those who met included Mr. Mackie, George Estey, Director of Generation Projects, Harold Coe, Senior Personnel Manager for the Design and Construction branch. He testified that Mr. Estey is part of the Ontario Hydro executive. The material placed before this group included the memorandum found at page 15 of the Board's earlier decision. Mr. O'Neill explained that he was trying to warn these people that the grievor would be referred to Ontario Hydro some time in the future and that Ontario Hydro had to be ready for that event. During the course of the meeting it was decided that a memorandum should be issued to all locations indicating the grievor was not eligible for employment until his situation was clarified. Mr. O'Neill testified that the 1975 incident and the grievor's most recent arrest made Ontario Hydro unsure whether it could rely on him as one

of its employees. Mr. O'Neill was then asked to prepare a letter along the lines of the letter ultimately sent out over Mr. Mackie's signature on February 16th, 1983. After doing this, Mr. Estey called Mr. O'Neill and indicated that he had thought it over and had decided not to issue the letter at that time. Information on the grievor had been given to all of the local hiring officials of Ontario Hydro and the decision to employ was going to be left with these individuals.

23. Mr. O'Neill testified that he was contacted by Mr. Thorne when the grievor was referred to the Lakeview Generating Station. Mr. Thorne inquired as to the contents of any letter that should be sent to the trade union. The decision not to hire the grievor was made by Mr. Lee who was Mr. Thorne's boss at the time. Mr. O'Neill advised Mr. Thorne as to the contents of the letter that was ultimately sent. Similarly, the grievor was consulted by Mr. Pegg with respect to the grievor's referrals to Sir Adam Beck, Cherry Wood, Hamilton Lake and Strachen Avenue transformer stations. Mr. O'Neill testified that the decision not to hire had been made by a Mr. Stai, Manager of the Southern Construction Zone, and Mr. O'Neill advised Mr. Pegg of the contents of any letter to be sent to the trade union. Mr. O'Neill denied wanting to discredit the grievor as President of the trade union or as an Irish Catholic. He said it was not in Ontario Hydro's best interests to attack Gilroy in that the Corporation wanted "clear leadership" and direction in the trade union. He said none of the actions of Ontario Hydro have been based on the grievor being an Irish Catholic. On cross-examination, Mr. O'Neill agreed that Mr. Mackie and Mr. Estey had not issued directions to refuse the hiring of the grievor. He said that his department is a staff function and that "the line" has the responsibility for making decisions. He simply provides these people with staff assistance. Thus, he would advise the officials making decisions with respect to Gilroy on what they should do but it was these officials who would make the decision. Further, Mr. O'Neill did not advise for all of Ontario Hydro's miscellaneous projects. He agreed that the zone manager controls all subcontractors performing work in the transmission system and a referral of Mr. Gilroy to one of these subcontractors would have resulted in a decision similar to that taken at the Bruce G.S. In releasing Mr. Mackie's letter of February 16th, 1983, Mr. O'Neill observed that it had been "demonstrated enough times that Bill was not going to be hired". However, the Corporation "didn't want to find Bill Gilroy guilty before the fact" and therefore no general letter was sent until February of 1983. He agreed that it would have taken a direction from Mr. Mackie or Mr. Estey for the grievor to be hired.

Argument

24. Mr. Wahl asked the Board to reconsider its earlier decision and find that the grievance involved a discharge of the grievor with the onus of proof of "just cause" resting with the employer. Alternatively, he submitted that even if the standard of arbitral review was arbitrariness and bad faith, Ontario Hydro should have the onus of proving that its decision complied with that standard. It was again urged upon the Board that in the absence of provisions granting the employer the right to reject referrals the hiring hall provision of the collective agreement granted the hiring function to the trade union and the standard just cause clause applied in respect of any refusal to hire. In this regard the Board was referred to *Re Bitulithic Ltd. and International Union of Operating Engineers, Local 115* (1977), 17 L.A.C. (2d) 47. It was submitted Ontario Hydro had failed to prove that the conduct of the grievor was employment related. Counsel contended that the only direct evidence given with respect to that incident was given by the grievor and that a plea of guilty is only an admission to the charge and not proof of all the evidence tendered by the Crown. At best, the 1975 incident,

it was submitted, pertained only to an assessment of the grievor's credibility before the Board. Counsel also stressed that there was no evidence of the grievor's involvement in any organization known as the IRA or with any individual associated with that group. All the direct evidence relating to the prior events was from Gilroy's mouth and counsel emphasized that Mr. Gilroy denied any association with the IRA or with persons he knew to be associated with the IRA. It was also asked how the Board could make an assessment of the reasonableness of Ontario Hydro's conduct without direct evidence substantiating its fears. Counsel submitted that the Board must come to the decision that the grievor has, on the evidence before it, nothing to do with the IRA. It was submitted that the only finding the Board could make is that the grievor was going to dinner in the United States.

25. Alternatively, it was submitted that if the grievor's conduct involved a breach of trust or constituted employment-related conduct, Ontario Hydro's position was too severe. In this respect the Board was directed to *Re McManus and Treasury Board* (1980), 25 L.A.C. (2d) 150; *Re Ville de Granby and Fraternite des Policiers De Granby Inc.* (1981), 3 L.A.C. (3d) 443; *Re Corporation of the City of Calgary and Amalgamated Transit Union, Local 583* (1981) 4 L.A.C. (3d) 50; and *Re Government of the Province of Alberta and Alberta Union of Provincial Employees* (1982) 7 L.A.C. (3d) 429.

26. It was further submitted that Ontario Hydro did not adduce sufficient evidence to demonstrate the reasonableness of the various refusals to hire. Counsel emphasized that Mr. Thorne and Mr. Stai did not testify and yet they made the operative decisions. There was also no direct evidence as to who made the decisions at the various non-nuclear generating stations, submitted counsel. It was argued that the failure of the direct decision makers to testify should cause the Board to draw a negative inference with respect to the bona fides and reasonableness of the decisions so made. It was also submitted that the decision-making was defective in that Ontario Hydro had not taken all reasonable steps to mitigate the risk associated with the grievor's employment such as closer supervision and appropriate transfers to less sensitive work. In this respect the decision was clearly arbitrary counsel submitted. See *Humber Memorial Hospital* (1982), 6 L.A.C. (3d) 97 and *Ontario Jockey Club* (1977) 17 L.A.C. (2d) 176. With respect to the various mitigating factors on which the applicant relied, counsel stressed the absence of proper security measures; the good employment record of the grievor and the fact that he had been employed on at least eight prior occasions without incident; and the fact that reasonable precautions could be taken to guard against any general concern the Corporation had. In counsel's view, the Corporation's conduct could be explained only by a "cover your backside" stance so that the employment of the grievor in light of his conviction "did not hit the papers".

27. Alternatively, it was submitted that the failure to hire the grievor interfered with his freedom of association. Counsel submitted that the Corporation's refusal to hire prevented the grievor from participating in the activities of his trade union. It was also contended that the decision of the Corporation interfered with the grievor's freedom to associate with whomever he wished – a reference to the Corporation's apprehension of the grievor's association with "terrorists". Counsel stressed that there was no proof of a world association of terrorists or that terrorist activity in Canada was a realistic fear in deciding whether to employ the grievor.

28. On behalf of the Corporation it was submitted that the issue before the Board whether the Corporation acted reasonably in judging Mr. Gilroy's reliability for employment. Counsel pointed out that there was specific proof of the grievor's misconduct on February 6th

and that his evidence with respect to that incident was so unsatisfactory as to confirm the reasonableness of the employer's rejection or refusal to hire. Counsel pointed out that in the Board's earlier decision it was held that the onus of establishing the unreasonableness of the Corporation's decision rested with the trade union and, having regard to all of the facts established with respect to the incident on February 6th, the union had not provided a reasonable explanation sufficient to alleviate the employer's concerns. Counsel stressed that terrorist-like violence is extremely difficult to predict and, thus, it was not possible to characterize the Corporation's actions with respect to the grievor as unreasonable. After the grievor's initial conviction in 1975, he was, counsel contended, put on notice as to the Corporation's concerns. He was given a second chance and, in counsel's submission, is not entitled to another. Counsel contended that, if anything, the Board had more and better evidence before it justifying the employer's decision than it had earlier. Counsel submitted that Mr. Gilroy was not a credible witness and could not be found to have told the truth with respect to the border incident. It was submitted that the grievor's story was totally specious and, thus, the Board was not provided with sufficient evidence to find the employer acted arbitrarily or unreasonably in the circumstances. Indeed, counsel contended that the grievor's willingness to fabricate a story justifying his involvement in the February incident confirmed his unreliability as an employee. If anything, counsel submitted, his testimony magnified the employer's legitimate concerns. It was contended that the employer was rightly concerned about its image given the dependence of the public on the Corporation's services. The Corporation had a need for reliable and predictable employees and the grievor, against the background of this case, did not qualify. Counsel stressed that no final or comprehensive decision was taken by Ontario Hydro until after the grievor pleaded guilty. It was submitted that power installations are clearly targets for the kinds of organizations that may have been the beneficiaries of activities in which the grievor has engaged.

Decision

29. The Board confirms its earlier decision that the grievor cannot take the benefit of the discharge or just cause provisions found in Article 13.01(b) of the Generation Projects Construction Agreement and Article 14.01(b) of the Transmission Systems Construction Collective Agreement. Both of these provisions apply to "an employee" who has been discharged or otherwise disciplined for cause and at the time of all refusals to hire the grievor was not, by definition, an employee in the bargaining unit. See also *McNeilly v. International Association of Bridge, Structural and Ornamental Ironworkers, Local 97*, 82 CLLC ¶16,195. The trade union has obligated itself under both collective agreements (Article 7) to refer "reliable and competent union members" and we confirm our earlier decision holding that Ontario Hydro's assessment of an employee's reliability and competence must be exercised "reasonably, in good faith and without discrimination". We further confirm our holding that the trade union bears the onus of proof in establishing that the employer has acted improperly with respect to this standard of conduct and arbitral review.

30. There can be no doubt, based on the evidence before us, that Ontario Hydro refused to employ the grievor in all instances because he was considered "unreliable" and, in effect, a security risk or threat to the company's various facilities. We accept that a public utility of the dimensions of Ontario Hydro constitutes a strategic industry. This is so from a political, an economic or a military perspective. It is therefore proper and reasonable for such an employer to be concerned about security matters. There is no dispute that the grievor was convicted in 1975 of a conspiracy to ship arms out of the country. The details of that conviction

are properly before us. The guilty plea and the related contents of the transcript constituted an admission against interest and an exception to the hearsay rule. See *English v. Richmond* (1956), 3 D.L.R. (2d) 385 (S.C.C.) and *R. v. Brown*, [1963] 3 C.C.C. 326, rev'd [1963] 3 C.C.C. 341 (S.C.C.). The grievor's testimony with respect to this prior conviction was not believable when viewed against the guilty plea and the other admissions revealed in the transcript. It has also been established that on February 6th, 1982 the grievor unlawfully conspired to aid others in an illegal entry of the United States of America. It was also established before this Board that the vehicle in which the grievor was riding contained a large amount of money and an apparent shopping list of arms. We have no doubt that all decisions to refuse to hire the grievor were made on the basis that the grievor constituted a security risk. All of the decision-makers were aware of the grievor's background and all, it is reasonable to infer, would have been motivated to act for the same reasoning as explained to us by Mr. Mackie.

31. The precise backgrounds of Edward Howell and Desmond or Michael Ellis remain undocumented before this Board by direct evidence. The only description of them in any detail is contained in the various newspaper reports reproduced in the Board's earlier decision. Howell, however, claimed possession of an Irish passport and both Howell and Ellis gave false names in attempting to seek entry to the United States. Howell's overnite case was discovered in the car in which the grievor was travelling. Howell's passport was also found in this vehicle as was a "shopping list" of arms. It was also established that the large amount of money found in the vehicle in which the grievor was travelling went unclaimed. Against these facts and the background of the grievor's earlier conviction, did Ontario Hydro act unreasonably or arbitrarily or in bad faith in refusing to re-employ the grievor? We believe we can take judicial notice that there is an organization known as the Irish Republican Army; that this organization is in support of Irish nationalism; and that in support of this objective it engages in acts of violence. It is in this latter respect that the organization has been characterized as a "terrorist group" throughout these proceedings. The Board has no evidence before it of acts of violence by the IRA in North America. We also have no direct evidence of co-operation between terrorist groups throughout the world. Mr. Mackie believes this to be the case but, he too, has no direct knowledge of this as a fact. We must ask whether Ontario Hydro acted unreasonably in acting upon its fears of such co-operation and its fears of potential violence in Canada against one of its facilities.

32. One of the difficulties in answering this question relates to the basic asymmetry of terrorist activity and related violence. Terrorists can attack anything, anywhere, anytime. This creates a continuing obsession on the part of potential victims with terrorist threats and physical security. How much security is enough? This, of course, depends upon the level of fear, a subjective measure. If terrorists had a more limited range of targets, one could more easily assess the effectiveness and reasonableness of various security measures. As it is, potential victims remain uncertain whether the absence of an attack is due to security or to the fact that terrorists never intended such an attack in the first place. The failure to act in the face of a known problem could later be characterized as incompetence, irresponsible, and poor management. On the other hand, given the absence of evidence of violence in Canada on behalf of Irish nationalism and the nature of the grievor's two criminal convictions, the employer's refusals to hire the grievor could also be characterized as excessive – an over-reaction brought about by a very high subjective level of fear. The reasons why these two conflicting characterizations are at the same time possible stems, of course, from the nature of terrorism. Obviously, an organization such as Ontario Hydro must take precautions against sabotage and possible acts of extortion. But actions of terrorist-like groups are hard to penetrate and hard

to predict. Knowing what Ontario Hydro knows or suspects or fears is mainly a matter of human intelligence. There is always “a high noise level” of threats, few of which materialize, few of which can be ignored. The problem, therefore, is that there is no clear line between prudence and paranoia. See generally J. B. Bell, *A Time of Terror: How Democratic Societies Respond to Revolutionary Violence* (1978).

33. A second major complication in assessing whether this employer’s refusal to hire the grievor has been unreasonable and, instead, more in the direction of paranoia is the failure of the grievor to provide the Board with a plausible and credible explanation of his conduct on February 6th. We simply do not accept his assertion that the two cars arrived at the U.S. border “by coincidence”. There was clear connection between the two gentlemen seeking unlawful entry into the United States and the grievor. The two gentlemen in question were travelling in the grievor’s car. The grievor, on his own testimony, initiated the involvement of Mr. Kelly. Thus, it is a reasonable inference to conclude that the grievor was responsible for Howell’s bag being in Kelly’s car. It is also reasonable to infer a direct connection between the grievor, the money and list of arms, etc. found in the car in which he was travelling, and the two gentlemen seeking unlawful entry into the United States in the grievor’s car which O’Neill was driving. The implausible and untruthful testimony of the grievor with respect to the February 6th incident makes it doubly difficult for this Board to assess the reasonableness or unreasonableness of Ontario Hydro’s fears. The export of guns abroad reasonably generates speculation of a connection with and support of violent activity abroad. The willingness of the grievor to engage in unlawful conduct in North America reasonably seen as connected to violent acts abroad raises the issue of his own reliability in Canada. Where does the grievor draw the line in his personal conduct and where is he able to draw the line? His failure to be candid with the Board has impeded our ability to make an informed assessment along these lines.

34. Having regard to all of the circumstances, we have come to the conclusion that the trade union has not met the legal onus of demonstrating that the refusals to hire the grievor were unreasonable, arbitrary or made in bad faith. We believe that the type of decision made by Ontario Hydro in this case is one meriting a substantial measure of deference. The nature of the management decision is one based on inference and one that is inherently difficult to document with direct evidence. Accordingly, where there is an unresolved doubt with respect to a potential security risk, deference ought to be paid to the decision of the employer who is responsible for the overall management of the organization affected. From this perspective, security clearances and the assessment of security risks are particularly central to management authority and responsibility. They ought not to be interfered with in the absence of clear and cogent evidence. See, for example, *Lee v. Attorney General of Canada et al.* (1981), 126 D.L.R. (3d) 1 (SCC).

35. There remains the Charter argument of the applicants. Section 2 and 32 of the Charter provide:

2. Everyone has the following fundamental freedoms:

- a) freedom of conscience and religion;
- b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

c) freedom of peaceful assembly; and

d) freedom of association.

32. (1) This Charter applies

a) to the Parliament and government of Canada in respect of all matters within authority of Parliament including all matters relating to the Yukon Territory, and Northwest Territories;

Does the Charter apply to Ontario Hydro in its employment decision-making? There appears to be little doubt that the Charter would apply to actions of government officials in issuing regulations and granting or denying licences or benefits authorized under statutes. (See Katherine Swinton, "Application: Canadian Charter of Rights and Freedoms", in *Canadian Charter of Rights and Freedoms: Commentary*, W. Tarnopolsky and G. Beaudoin and Paul Bender, "The Canadian Charter of Rights and Freedoms and the United States Bill of Rights: A Comparison", 28 McGill Law Journal 84). Can the employment actions of Ontario Hydro be properly characterized as government or state action within the meaning of section 32(1) of the Charter? Ontario Hydro is a creature of statute and subject to, on a reading of this statute, extensive government control. See the *Power Corporation Act* RSO 1980 c.384. In *Jackson v. Metropolitan Edison* 419 U.S. 345 (1974) the defendant was a private company that exercised monopoly control over Pennsylvania's hydro electricity supply. The Court stated that state regulation would not by itself constitute state or governmental action and that a company in a monopoly position would not necessarily be carrying out governmental or state actions. At page 453 of the judgment, the majority of the Court noted:

It may well be that acts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be "state" acts than will the acts of an entity lacking these characteristics. But the inquiry must be whether there is sufficiently close nexus between the State and the challenged action of the latter may be fairly treated as that of the state itself. *Moose Lodge No. 107* supra 407 U.S. at 176, 92 St.Ct. at 1973. The true nature of the State's involvement may not be immediately obvious, and detailed inquiry may be required in order to determine whether the test is met. *Burton v. Wilmington Parking Authority*, supra.

The approach taken by the United States Supreme Court appears to be that only where there is a delegation of authority by the state to another body of an activity which the state is obligated to carry out will that latter body be deemed to be carrying out state action. The Court elaborated this view as follows:

If we were dealing with the exercise by Metropolitan of some power delegated to it by the state which is traditionally associated with sovereignty, such as eminent domain, our case would be quite a different one. But while the Pennsylvania statute imposes an obligation to furnish service on regulated utilities, it imposes no such obligation on the state. The Pennsylvania courts have rejected the contention that the furnishing of utility services is either a state function or a municipal duty.

36. However, the question of whether the state's delegation of authority with respect to a service it is not obligated to provide to corporations it itself owns constitutes state action is not specifically addressed in the judgment. The obvious question therefore remains. Where does a public corporation such as Ontario Hydro fit?

37. Of some relevance is the decision of The Ontario High Court in *Re McCutcheon and City of Toronto et al.*, (1983), 41 O.R. (2d) 652 which accepted the "state action" approach in determining the legislative reach of section 32 of the Charter in relation to municipal by-laws. In this respect the Court wrote at pages 662-663:

Second, s.32(1) contemplates municipal by-laws being subject to the Charter. Counsel for the respondents point out that there is no express mention of municipal governments and their by-laws as s.32 which provides that the Charter applies to the Parliament and Government of Canada and the Legislature and government of each province. Absent a specific reference to municipal governments in s.32(1), it is contended, that the Charter does not apply to them and, hence, it cannot render in-operative their by-laws, notwithstanding any inconsistency between a by-law and a constitutionally guaranteed right or freedom.

This cannot be the case, for it would permit circumvention of the Charter through delegation to any body that is not classified as part of the Government of Canada or a province. This is contrary to the tenor of s.32(1), which provides that subordinates (the Governments of Canada and of each province) cannot do that which their principals (Parliament and the Legislatures) cannot do. It must be that more junior subordinates, like municipalities, are to be similarly bound by the Charter.

The American experience is of help here. The Bill of Rights in the United States is, on its face, addressed exclusively to the federal and state governments. Private activity offensive to the Bill's guarantees of liberty and equality can be enjoined, however, where "state" (i.e. governmental) action or inaction can be characterized as tacit affirmation of the private action. Most particularly, delegation of government authority will permit a conclusion of "state action", as in *Evans et al. v. Newton et al.* (1966), 382 U.S. 296 at p.299, where the U.S. Supreme Court declared:

[W]hen private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations.

It follows that municipal governments in the U.S. are bound by the Bill of Rights. Thus, in *Buchanan v. Warley* (1917), 245 U.S. 60 at p.81, the U.S. Supreme Court used constitutional principles to strike down a municipal ordinance which denied meep of "state action" is subtle and elusive. The U.S. Supreme Court itself has acknowledged that foSpeaking for the court, Mr. Justice Day stated:

It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the federal constitution.

In the U.S. the concept of "state action" is subtle and elusive. The U.S. Supreme Court itself has acknowledged that formulating "an infallible test" is "an impossible task": *Reitman et al v. Mulkey et al.* (1967) 387 U.S. 369 at p.378. There are many cases grappling with the issue and the scholars have not yet resolved it definitively: see Tribe, *American Constitutional Law* (1978), at p.1155.

The Charter of Rights and Freedoms is meant to curtail absolute parliamentary and legislative supremacy in Canada. As such, the Charter addresses itself expressly to the two levels of government whose primary legislative organs have been held in the past to be sovereign within their respective spheres. Municipalities, though a distinct level of government for some purposes, have no constitutional status; they are merely "creatures of the legislature", with no existence independent of the Legislature of government of the province. Hence, just as the provincial Legislatures and governments are bound by the Charter, so too are municipalities, whose by-laws and other actions must be considered, for the purposes of s.32(1), as actions of the provincial government which gave them birth. Thus, these by-laws must comply with the Charter by virtue of both s.52 and s.32.

I cannot imagine that there exists any doubt that the regulation of parking on municipal streets is a "local" matter within s.92(16) of the *Constitution Act, 1867* and hence is a matter "within the authority of the legislature" referred to in s.32(1)(b) of the Charter.

The proposition that municipal by-laws are subject to the Charter is further buttressed by the provisions of s.2 of the *Summary Convictions Act*. That section specifically provides that the Act applies to matters

- (a) ...over which the Legislature has legislative authority and for which such person is liable, on summary conviction, to imprisonment, fine, penalty or punishment...

To bring a municipal parking by-law under the *Summary Convictions Act* for purposes of enforcement it is essential that the by-law be a matter "over which the Legislature has...authority" or in the words of the Charter, s.32(1)(b), "within the authority of the legislature".

38. It, however, was also argued that even if Ontario Hydro can be characterized as part of the state for the purposes of the Charter, not all the actions of the state ought to be subject to the Charter. In response counsel for the applicants relied on *Smith et al. v. Hydro Electric Power Commission of Ontario* (1976) 14 O.R. (2d) 502 where in the context of a

tort action the Hydro-Electric Power Commission of Ontario was held to constitute a public authority within the meaning of the *Public Authorities Protection Act*, an act that contains a six month limitation period for the commencement of causes of action. On the other hand counsel for the respondent relied on *Hanna v. Ontario Hydro* (1982), 37 O.R. (2d) 783 where it was held that the *Public Authorities Protection Act* did not apply to conduct of a public authority that was subordinate and incidental to its primary public functions. In that case, it was held that the limitation period did not apply to an employment related cause of action. It is on the basis of this latter case that the respondent argues that its employment-related decision-making is more analogous to private conduct which the Charter is not aimed at regulating. He, however, acknowledges that the Charter makes no explicit distinction between primary and subordinate governmental actions and in *Re McCutcheon and City of Toronto*, *supra*, the Ontario Supreme Court was concerned about distinctions which could permit the circumvention of the Charter through ad hoc administrative decision-making on issues which would otherwise attract legislation and related regulatory enactments. The cases reveal that security related requirements have been the subject matter of legislation and related regulations and not just applied on an administrative decision-making basis. See *Lee v. Attorney General of Canada et al.*, *supra*; *United States v. Robel* (1967) 389 U.S. 258 (USSC); *Wieman et al. v. Updegraff* 344 U.S. 183 (USSC); *Cafeteria and Restaurant Workers Union, Local 473 and McElroy* 367 U.S. 886 (USSC). And yet the implications of the applicant's argument might be to subject all of a government body's commercial and administrative transactions to the Charter. In this respect, it can be argued that these responsibilities are necessary for the government to carry on its affairs but they are not the essence of governmental action. In other words, they are acting with others as their employers or customers and not as their government.

39. Nevertheless, the American authorities clearly establish, that subject to certain considerations, employees do not forfeit their constitutional protections when they enter the public service. The seminal cases for the first amendment protection for public employees are *Perry v. Sniderman* (1972), 408 U.S. 592 and *Pickering v. Board of Education* (1968), 391 U.S. 563. In *Perry* the Supreme Court noted at page 597:

[I2] For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech of associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly". *Speiser v. Randall*, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460. Such interference with constitutional rights is impermissible.

However, the United States Supreme Court has also noted that such protections are not absolute and that regulations as to time, place and manner might be legitimate so long as such limitations are reasonably related to the public interest. See *Cox v. Louisiana* (1965), 379 U.S.

536 at 558. The Court in *Pickering*, *supra*, characterized this problem of degree in the context of free speech in the following manner at page 568:

The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees.

(See also *Phillips v. Adult Probation Dept.* 491 F.2d. 951, at 954.)

See also *Aboud v. Detroit Board of Education* 431 U.S. 209 (1977).

40. We also note that while the protection given the public employee to exercise his first amendment rights might appear, at first glance, very broad in the United States, such protection is not forthcoming unless a “substantial part” of the employer’s decision to terminate or discipline was based upon the employee’s exercise of his protected rights. The Supreme Court in *Mount Healthy City Board of Education v. Doyle* (1977), 429 U.S. 274 in establishing the “substantial part” test did not wish to use the first amendment in instances where the exercise of such rights was but only one of many reasons for the employer’s action. To do so, the Court felt, would be to put the employee in a position than he might otherwise not have been in. As such, the Court held at page 516:

Once the employee has shown that his constitutionally protected conduct played a substantial role in the employer’s decision not to rehire him, the employer is entitled to show “by a preponderance of the evidence that it would have reached the same decision as to the employee’s re-employment even in the absence of protected conduct. (for a similar result see *Givhan v. West Line Consolidated School* 439 U.S. 410, 99 S.Ct. 693, 697.)

41. Because of the profound importance and complexity of the applicant’s assertion that the Charter applies to Ontario Hydro’s employment decision-making we have reviewed the competing considerations in some detail. But for the same reasons, and given our conclusion in this case that even if the Charter applied the grievances must be dismissed, we will make no final determination on the Charter’s application. Therefore, assuming, without deciding, that the Charter applies, we cannot find that the respondent’s action in this case would have violated the Charter. In the facts at hand, the grievor pleaded guilty to a criminal charge in the United States which, having regard to all of the circumstances, was reasonably seen as job-related from a security point of view. Ontario Hydro was not reacting to “mere association” or to the exercise of any other right which the grievor might claim under the Charter. The grievor involved himself in circumstances which reasonably attracted the response of his former employer and we have no jurisdiction under the collective agreements or the Charter to intervene.

42. For all of these reasons the grievances are dismissed.

0125-83-U Leo McMullen, Complainant, v. Canadian Union of Public Employees – C.L.C. Ontario Hydro Employees Union Local 1000, Respondent, v. **Ontario Hydro**, Intervener

Duty of Fair Representation – Unfair Labour Practice – Union undertaking not to grieve discharges arising out of mandatory referral of employees to alcohol rehabilitation program provided proper procedure followed – Undertaking for general benefit of unit for sound policy reasons no breach – Failure to communicate undertaking and reasons for refusal to file discharge grievance not breach in circumstances

BEFORE: N. B. Satterfield, Vice-Chairman.

APPEARANCES: *Robin B. Cumine, Q.C. and Leo McMullen for the complainant; Naomi Duguid, Bill Vincer and Jack Atkinson for the respondent; Paul Jarvis, Barry Cruickshanks, Wes Chalmers, Al Steels and Dr. Tom Hamilton for the intervener.*

DECISION OF THE BOARD; February 13, 1984

1. The complainant, Leo McMullen, has filed a complaint under section 89 of the *Labour Relations Act* alleging that the Canadian Union of Public Employees – C.L.C. Ontario Hydro Employees Local Union 1000 (“Local 1000”) has dealt with him contrary to the provisions of section 68 of the Act. That section sets out in the following terms the duty of unions to fairly represent employees for whom they have bargaining rights:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

2. The complaint which was made April 19th, 1983 arises out of the termination of McMullen’s employment with the intervener Ontario Hydro (“Hydro”) on September 24th, 1982 and the refusal and failure of the responsible officials of Local 1000 to take up a grievance on McMullen’s behalf. The specific complaint is that Local 1000’s failure to proceed with a grievance is contrary to section 68 “...in that [Local 1000] did not take any or proper steps to consider the facts or the validity of the grievance, did not at any time consult with [McMullen], did not consider the grievance formally in any manner and took no steps to process the grievance.”. The relief requested in the complaint is that the Board direct Local 1000 to proceed with a grievance of McMullen’s dismissal. Scheduled hearings into the complaint were adjourned on three separate occasions on consent of the parties while they attempted to resolve the complaint. It came on for hearing ultimately in August and September 1983.

3. The formal reasons given by Hydro to McMullen for his dismissal are contained in a memorandum dated September 24th, 1982 addressed to him from A. K. Steels, personnel manager for Hydro's western region which incorporates by reference certain terms and conditions contained in an earlier letter dated August 19th, 1981 from Hydro's area manager, W. C. Chalmers, also addressed to McMullen. That letter contains the caution "Any deviation from the foregoing requirements will result in immediate termination of your employment with Ontario Hydro.". The "foregoing requirements" are a reference to the essential steps pursuant to a mandatory referral for treatment of alcohol abuse under Hydro's "Employee Assistance Program for Alcohol and Drug Problems" ("the Program").

4. A brochure about the Program issued to all Hydro employees includes the following statement under the heading "Ontario Hydro's Policy":

Alcoholism and other forms of drug abuse are recognized as health problems requiring medical treatment. Their recognition and handling is part of the Preventative Health Program of the Health Services Department, Health and Safety Division.

According to the brochure, the Program is endorsed by a Joint Advisory Committee on the Employee Assistance Program for Alcohol and Drug Abuse ("the J.A.C."). Local 1000 and two other organizations representing Hydro staff are represented on the J.A.C.. Local 1000's representative is Ivan Hehn who is also the Local's co-ordinator for the Program. He has been a Hydro employee for over 30 years and an official of Local 1000 for more than half of that time. He told the Board that the Program is a successor to one which had been operated by Hydro since approximately 1969 without participation by Local 1000. The Program developed out of studies and recommendations of the J.A.C. and Local 1000 has been jointly involved with Hydro in the Program's operation since 1978, although its day to day administration is carried out by Hydro's Health Services Department.

5. Employees are referred to treatment under the program either by voluntary request or mandatory referral which the brochure describes in the following terms:

Voluntary requests for help before job performance is affected, are encouraged. The most difficult step is admitting to the need for help. Such requests will be kept confidential and will not jeopardize employment. The main objective of the program is to encourage voluntary participation.

Mandatory referral will continue to be necessary in those cases where an alcohol or drug problem contributes to unacceptable job performance and behaviour. Successful completion of the prescribed treatment and follow-up period is a condition of continued employment.

Hehn confirmed that voluntary requests to be referred for treatment are without prejudice to employment and would not form a basis for disciplinary action. Mandatory referrals result when employees have documented, work-related problems connected with alcohol or drug abuse. Hydro and Local 1000 consider mandatory referral for treatment under the Program to be an alternative to discipline as an approach to managing alcohol and drug related problems which impact on work performance, including attendance. The Program relies on and

utilizes treatment facilities existing in the community. Once a work problem is identified, the employee undergoes a medical assessment following which, according to the brochure

“..., a variety of treatment approaches is possible. Counselling sessions or full-time attendance at a clinic as an out-patient or in-patient for three or four weeks may be involved. Follow-up care for approximately one year is usual.”

The specific form and nature of follow-up care depends upon the employee and what services are available in his locale. Follow-up usually involves the employee reporting to a counsellor and he may use other self-help services such as Alcoholics Anonymous.

6. Local 1000 had no right to know why an employee was placed on the predecessor program, becoming involved only if the employee was disciplined or discharged for failure to respond to the program. Only then could the union investigate the facts and decide whether to file a grievance. Under the Program Local 1000 has the right to know why an employee has been given a mandatory referral. It cannot rely, however, on an employee being given more than one referral if he is not successful on the first. Hehn told the Board that the Program is designed to give an employee one opportunity only. The discretion to make any further referral is vested in Dr. Hamilton. Local 1000 can attempt to persuade him to give an employee a second chance, but it has no right to require that an employee be given a second referral. If Local 1000 is not satisfied that there is documented unsatisfactory work performance with respect to an employee being referred to the Program, it would grieve the referral. Other examples given by Hehn of circumstances in which the Union would file a grievance were: if an employee on the Program was dismissed for allegedly failing to follow it and the allegation was improperly or inadequately founded; or, if an employee with an alcohol problem was dismissed for poor work performance without having had a chance to go on the program.

7. If Hydro has administered the Program properly in the first instance, Local 1000 will not file a grievance for an employee who has been given a mandatory referral or has been disciplined or discharged for refusing or failing to comply with the Program. Hehn offered several reasons why Local 1000 does not grieve mandatory referrals to the program or discharge for refusal or failure to follow the Program as long as it is properly administered. Local 1000 decided to participate jointly with Hydro in the Program because it accepts the viewpoint that alcohol abuse is a disease and because the Local's participation jointly with Hydro management demonstrates to employees the deep concern of both parties with the problem of alcohol and drug abuse. Local 1000 and Hydro have accepted the advice of experts consulted by the J.A.C. with respect to the importance of being firm about the discipline consequences for an employee on mandatory referral who fails to co-operate in treatment and continues to give unsatisfactory job performance. For example, if an employee who is on mandatory referral to the Program is told, because of his prior unsatisfactory work record, he will be discharged if he fails to co-operate in treatment, it is critical to his chances for success that he believes that will be the real result of failure to follow the Program. That becomes his incentive to succeed. Making the consequences stick for any particular referral is important to the overall credibility of the Program because the employees at large must know that, if any of them become candidates for mandatory referral, the price of failure to co-operate in treatment and continuing unsatisfactory work performance is the discipline they have

been cautioned to expect, which potentially could be termination of employment. This discipline aspect of the Program is referred to in the policy statement which formed part of the J.A.C.'s recommendation as "constructive coercion". In view of that approach, according to Hehn, it would be destructive of the Program's objectives if Local 1000 were to grieve discipline arising out of proper application of the Program. Therefore it is part of Local 1000's support of the Program that it will not grieve if the Program is properly applied.

8. Hehn acknowledges, however, that no waiver of the right of employees, Local 1000 or Hydro to grieve under the collective agreement is created by the Program. In fact, the Board notes that a Hydro personnel policies and procedures document entered into exhibit by Local 1000 counsel and titled Control of Alcoholism and Drug Abuse, which deals with the Program contains the following statement:

"Involvement in [the Program] does not prevent recourse to normal grievance ... procedures."

It contains as well the following statement of specific responsibilities under the Program for employee representatives:

(4) Responsibilities of the Employee Representative

The 1977 Joint Advisory Committee on Alcohol and Drug Abuse (O.H.E.U., C.U.O.E., Society and Ontario Hydro) developed the following statement of responsibilities which has been accepted by the participating organizations.

- (a) To be familiar with the policies and procedures of the Employee Assistance Programme.
- (b) To provide information on the programme and encourage employees who may have an alcohol or drug problem to seek assistance voluntarily before job performance is affected.
- (c) In mandatory referral situations to ensure that the rights of their bargaining unit members are explained to them.
- (d) To advise employees of their options should they refuse the help offered through the Programme.
- (e) To participate in ensuring support and follow-up on the job to facilitate the employee's rehabilitation.

9. In Hehn's view, the just cause provisions of the collective agreement between Local 1000 and Hydro with respect to discipline and discharge are satisfied when the Program has been properly applied to an employee and the employee has understood the risk of discharge being the consequence of his failure to respond to the program. The agreement provides as follows:

ARTICLE 2 GRIEVANCE PROCEDURE

• • • •

- 2.2 Any allegation that an employee has been subjected to unfair treatment or any dispute arising out of the content of this Agreement shall be understood to be a fit matter for the following grievance procedure. All matters of grievance by any employee or group or class of employees for whom the Union is the bargaining agent and which the Union may desire to present shall be dealt with in accordance with the following procedure, provided, however, that the Union must file notice of intent to grieve within three months of the grievous act and formally grieve within six months of the grievous act. However, the Union may file notice of intent to grieve within six months of the grievous act and formally grieve within nine months of the grievous act if the Union satisfies Ontario Hydro or an Arbitration Board that circumstances beyond the control of the Union or its representatives prevented the filing of such notice within the three months.

• • • •

ARTICLE 2A DISCIPLINE AND DISCHARGE

- 2A.1 Any allegation that an employee, other than a probationary employee, has been demoted, suspended, discharged or otherwise disciplined without just cause shall be a fit matter for the Grievance and Arbitration procedures as provided for in this Collective Agreement.
- 2A.2 Any allegation that a probationary employee has been demoted, suspended, discharged or otherwise disciplined without just cause shall be a fit matter for the Grievance procedure only.

The chief steward has the responsibility to decide whether to file a grievance with respect to administration of the Program.

10. According to Hehn, Local 1000's participation with the Program's application to an employee begins with the employee's chief steward being notified by Hydro's area management of the existence of documented poor work performance in which alcohol or drug use is a suspected factor. If the chief steward is satisfied that there is a problem, he does not intervene. Next, the employee is interviewed by Hydro about the problem. The employee has the option of having a Local 1000 representative with him in the interview. It may be inferred from the evidence that the various steps of the Program are described to the employee in the interview and the consequences pointed out of refusing or failing to follow them. Whether or not a Local 1000 representative participated in the interview, it is the chief steward's responsibility to advise the employee of the seriousness of his situation, the importance of following each step of the Program and the follow-up and that the consequence of failure will

be discharge. The chief steward must make it clear to the employee that the union will not file a grievance if discharge results from his failure or refusal to follow the Program.

11. McMullen was employed in Hydro's forestry division from 1956 until his employment was terminated September 24th, 1982. He worked out of the Chatham service centre and was a journeyman forester when he was discharged. His work as a forester involved the clearing of obstructions to Hydro power lines, including live power lines, and the maintenance of areas around power lines. The work required him to drive a variety of vehicles, operate chain saws, work out of lift buckets and feed brush into a brush chipper. Prior to the incidents referred to hereunder, McMullen was never disciplined and was never involved in any work related vehicle or personal accidents.

12. His first exposure to the Program occurred in September 1979 when a Hydro supervisor suggested he would benefit from it. The suggestion followed an incident where he showed up for work appearing to the supervisor to be under the influence of alcohol. McMullen underwent a three-week in-patient treatment program by the end of which he had stopped drinking. In February 1980 he was given a mandatory referral to the Program. This time he was seen by a Hydro supervisor leaving the service centre yard in a Hydro vehicle. The supervisor followed McMullen, apparently considering him to be under the influence of alcohol and unfit for work, stopped him outside the yard and ordered him to return to the yard. He was sent home and told to report to his area manager the next day, February 20th. He reported sick instead. On February 21st, the area manager wrote to McMullen placing him on unpaid leave and directing him to report to Hydro's chief physician, Dr. T.R. Hamilton. The direction contained the following statement:

"It should be clearly understood that the appointment with Dr. Hamilton is not voluntary but rather is mandatory and any other action on your part without approval will be dealt with as a direct defiance of orders."

The letter contains no direct reference to McMullen's employment being at risk. The referral to Dr. Hamilton did result in McMullen entering and completing a 28-day in-patient program for alcohol abuse. He returned to work immediately upon discharge from the program in late April 1980 at which time he received a letter from his area manager stating in part:

• • • •

We feel quite confident you will be able to continue your present abstinence but feel you should understand clearly the responsibility you now have *in order to avoid disciplinary action including termination of your employment.*

1. You must avoid alcohol.
2. You must remain in a treatment program satisfactory to the chief physician.
3. You must produce satisfactory work performance.

• • • •

At the same time I would like to make it perfectly clear that any help you feel is necessary is available and you should not hesitate to make the need known.

• • • •

(emphasis added)

13. On August 19th, 1981, the area manager wrote to McMullen again because he had been absent from work for a week and the manager claimed to have evidence McMullen was drinking again. The letter includes a reference to the warning underlined in the excerpt quoted above from the earlier letter. Instead of discharging McMullen, however, the manager set out in the letter specific conditions with which McMullen was required to comply in order to retain his employment. The conditions concluded with the following warning:

“Any deviation from the foregoing requirements will result in immediate termination of your employment with Ontario Hydro.”

McMullen complied with the conditions, re-entered and completed another 28-day in-patient treatment program and returned to work on October 2nd, 1981. A letter of the same date from his area manager includes the following statement:

“While as stated we do intend to help you in any way we can, it should be very clearly understood, Leo, that the responsibility to remain clear of the debilitating use of alcohol is yours. Failure to do so will be taken as evidence you are no longer able to safely perform in the workplace and no alternative will be available other than to terminate your employment with Ontario Hydro. All of the support others can offer has now been provided, Leo, and the rest is up to you.”

When he began drinking again in September 1982 and was absent from work he was discharged in the manner set out in paragraph 3 above. Steels' memorandum dated September 24th, 1982 outlines the following reasons for termination of his employment:

This letter will confirm our discussion at your home this afternoon concerning your absence from work without authorization.

You have been absent since September 7, 1982. You claimed to have arranged for vacation for four days, September 7 to 10 inclusive, and because there appears to be some misunderstanding here, the four days have been allowed on vacation. The 10 working days commencing on September 13 have been treated as Personal days off without pay.

This type of work performance cannot be tolerated, and there is considerable evidence that this is a repeat of your 1980 and 1981 problem. You were warned quite clearly in W. C. Chalmers' letter to you on August 19, 1981, that your services would be terminated if you did not follow the conditions outlined in that letter.

You have failed to do so and have been absent from work without approval. Therefore your employment with Ontario Hydro is being terminated at 4:30 p.m. Friday, September 24, 1982.

14. Jack Atkinson is the chief steward of Local 1000 for the Chatham service centre and he works out of that centre. He has been with Hydro for 35 years and has been chief steward since 1973 with responsibility for approximately 65 employees. He was aware of McMullen's voluntary entry into this Program in 1979 and that's when he learned that McMullen had a problem with alcohol. On the two occasions when McMullen was given mandatory referrals to the Program, Atkinson received copies of the referrals and of the area manager's letters to McMullen when he returned from those treatments. Those were the only communications he received about these incidents. Atkinson was clearly aware of the circumstances resulting in the first referral. He had been told about the February 19th incident and on February 20th Chalmers told him that McMullen had not reported to work that day and asked Atkinson to make sure he reported on February 21st. Atkinson contacted McMullen's wife and told her to make sure he reported to work because Hydro was talking about possible termination of his employment. There is no evidence that Atkinson verified the events of February 19th which triggered the first referral or the circumstances giving rise to the second referral. Nor is there any evidence of Atkinson having advised McMullen, on either referral, that Local 1000 would not file a grievance for him if the Program was properly applied and he failed to comply with it. Atkinson could not recall speaking with McMullen before he went for treatment on the second mandatory referral. Each time McMullen returned from treatment Atkinson made it known to him that he and Local 1000 were available if McMullen needed help. Atkinson tried to maintain contact with McMullen so he would be aware someone was interested in his well-being. He also tried through other Hydro employees to keep informed of McMullen. Atkinson was not aware of any details of McMullen's follow-up treatment programs and relied on what McMullen told him.

15. Atkinson learned from McMullen's foreman of his possible discharge. This knowledge prompted Atkinson to call his division chairman for advice on what action to take should McMullen be discharged. Atkinson reviewed with his chairman his copies of the letters from Hydro to McMullen. Since they served to advise Atkinson of the problem with McMullen and the action to be taken under the Program, Atkinson and the division chairman concluded that Hydro had fulfilled its obligation to Local 1000 and had properly applied the Program with respect to McMullen. The division chairman advised Atkinson that there would be no cause for a grievance in those circumstances. After Atkinson was notified of McMullen's discharge he checked with his division chairman to make sure he had not overlooked anything. He also raised the question of whether there was grounds for filing a grievance with other chief stewards in his division at a meeting shortly after the discharge. They agreed that there was no ground for filing a grievance.

16. Atkinson spoke without success to Chalmers, the area manager, and to Hydro's regional personnel manager to see if the discharge could be rescinded. He spoke to McMullen twice following the discharge. The first time was when McMullen called him a few days after the event to ask whether Local 1000 could do anything for him. McMullen did not ask Atkinson to take up a grievance but he told McMullen that there was "no possibility of a grievance". On the second contact, Atkinson told McMullen he had been unable to get any of

Hydro's local management to amend his discharge and advised McMullen to contact Bill Vincer, president of Local 1000. Atkinson did not attempt on either of these contacts to get McMullen's side of the story as to why a grievance should be filed.

17. After McMullen's discharge, a relative, Gerald Nagle, intervened on his behalf to try to restore his employment with Hydro. Nagle was aware from his own occupation of matters such as time limits for filing grievances. His concern began when, by two weeks after McMullen's discharge, no one from Local 1000 had contacted McMullen. In addition to his concern about the time limits, Nagle interpreted the lack of contact to mean that neither Local 1000 nor Hydro was aware of two factors which might be grounds for mitigating the discharge. First, the possibility that McMullen's unauthorized absence in September was the result of medication prescribed by his doctor for treatment of depression. Second, his counsellor under the follow-up treatment program had failed to keep several appointments with McMullen, particularly the appointment in August, the month prior to his discharge. Accordingly, early in October he made an appointment with Atkinson for October 12th. Atkinson told him that McMullen had been given several chances by Hydro to correct his performance problem; that Local 1000 would not arbitrate a grievance in these circumstances and there was nothing Atkinson could do to get Hydro to reinstate McMullen. Apparently Atkinson did not inform Nagle that he had discussed the matter with his division chairman who had advised that a grievance would not be in order.

18. Atkinson told Nagle that he should speak to Bill Vincer, President of Local 1000, if he wanted the Local to act to have McMullen reinstated. Nagle contacted Vincer, expressed his concern about the time limit for filing a grievance and told Vincer there were mitigating factors in McMullen's favour. Vincer referred Nagle to Hehn. After speaking with Nagle in December, Vincer had Atkinson send his file on McMullen to him for review. Vincer also discussed the matter on the telephone with Atkinson. His discussion and file review satisfied Vincer that there was nothing improper in the way Atkinson handled McMullen's case. Vincer's evidence in chief was that Local 1000 will file a grievance on discharge or major discipline and pursue it through to arbitration if there is any prospect for success. He told the Board that Local 1000 would do that for any grievance which was not frivolous, but, in his opinion, it would have been frivolous to pursue McMullen's grievance because his was almost a classic case of progressive discipline ending in discharge. Vincer claims that McMullen's absences during three years prior to discharge were sufficient alone for discharge without any alcohol problem. He testified that he reviewed McMullen's employment history with Nagle when he spoke to him last in March 1983. That was the day on which Nagle later met with McMullen's counsel to file this complaint.

19. Vincer acknowledged in cross-examination that he had heard Atkinson testify that he had based his decision not to file a grievance solely on the fact that Hydro had followed the Program properly with McMullen. He was aware of that fact when he reviewed Atkinson's file and did not suggest that he should have done anything more because Vincer considered Atkinson to have handled the decision properly. In any event, the decision was still justified on the grounds that there were three work performance infractions compounded by the alcohol problem. Vincer claimed that there have been no cases of discipline under the Program in which the employee involved was not interviewed by a Local 1000 official, but he did not know if anyone had heard McMullen's views on his discharge. During re-examination, Vincer testified that, when the Program is applied correctly and an employee is disciplined or discharged, Local 1000 examines the facts to see if there is a basis for filing a grievance, but

in McMullen's case, the facts were substantial unauthorized absences over a three-year period and one incident of reporting for work under the influence of alcohol and would not sustain a grievance.

20. Nagle had two conversations with Hehn, one on the same day as he had contacted Vincer and another on the next day. Nagle once more expressed his concern about the grievance procedure time limits and apprised Hehn of the circumstances which he thought might serve to mitigate the discharge and his concern that no one in Hydro or Local 1000 seemed to be aware of them or, if aware, had paid no heed to them. Hehn's advice was that Nagle's concern about mitigating factors might better be addressed under the Program than in the grievance procedure. Hehn suggested to Nagle that he speak to Dr. Hamilton. Nagle decided to do so, but, since Dr. Hamilton would not be available until early January 1983, he and Hehn agreed to let the matter rest until that meeting could be arranged. Nagle did meet with Dr. Hamilton in late January but that contact ended with no change in the results. After that meeting had taken place, Hehn also discussed with Dr. Hamilton Nagle's concern about the alleged failure of McMullen's counsellor to make the follow-up visits. By the time of this discussion, Hehn had been told by Vincer that his review of Atkinson's record of the mandatory referrals had satisfied Vincer that Hydro had applied the Program properly to McMullen. On the basis of these two pieces of information Hehn decided that the discharge was not grievable and advised Nagle to this effect.

21. Prior to his meeting with Vincer, Nagle had also voiced his concerns, without avail, to Chalmers and Hydro's area management that there were extenuating factors relating to McMullen's conduct immediately prior to his discharge. By the time he had talked to Dr. Hamilton, Nagle had appealed unsuccessfully to all of the management persons with responsibility for application of the Program and those officials of Local 1000 who had responsibility for the Program or for processing a grievance for McMullen. Next he acted to retain counsel for McMullen and this complaint was filed. On the same day when Nagle engaged counsel he went to see Vincer to see if Local 1000 would file a grievance. Vincer advised him that it was too late to file a grievance because the time limits had expired.

22. Complainant counsel acknowledges that Local 1000's failure or refusal to process a grievance on behalf of McMullen is not grounded in any bad faith. He argues, however, that the facts do establish that Local 1000 has acted in a manner which is arbitrary and discriminatory in its representation of McMullen.

23. He asks the Board to look at the facts with respect to the discharge, the responsibilities of Local 1000 officials under the collective agreement and what they did and failed to do against a legal context where:

- (1) The Act requires collective agreements to provide for arbitration of disputes arising out of them and Article 3 of the agreement herein meets that requirement. Section 44(9) of the Act allows an arbitrator to substitute another penalty for discharge for cause where the collective agreement does not contain a specific penalty for the infraction at issue. The collective agreement contains no specific penalty for McMullen's infraction.

- (2) Arbitrators, in deciding whether to substitute another penalty for the

discipline or discharge assessed against any employee, consider such factors as the employee's record with the employer, his seniority or length of service, the employee's potential for rehabilitation, including his state of mind at the time when the matter is under consideration and the economic hardship on the employee relative to the infraction. Counsel cited as specific examples of the application of these factors by arbitrators two awards where alcohol was a factor and a lesser penalty was substituted for discharge for just cause: *Re Labatt's Ontario Breweries Ltd.*, (1978), 20 L.A.C. (2d) 66 (Brunner) and *Re Cook and The Crown in Right of Ontario* (1979), 22 L.A.C. (2d) 1.

24. The factual matters which are to be considered within that legal framework, according to counsel are:

- (1) McMullen had 27 1/2 years service with Hydro at discharge and for approximately the first 24 years had not been disciplined and had not been involved in any vehicle accidents or personal injuries.
- (2) He was age 53 when discharged and, with no special skills or education to fall back on, this was equivalent to what some arbitrators refer to as economic capital punishment.
- (3) The infractions, looked at apart from the Program, for which McMullen was discharged were reporting once for work in an unfit condition because of alcohol (February 1980) and twice failing to report for work without permission to be absent, once in August 1981 and again in August 1982 for which he was fired. These were the only recorded incidents of a disciplinary nature in more than 27 years of employment with Hydro.
- (4) The only contact made with McMullen by Local 1000 officials after his discharge was in the two brief telephone conversations with Atkinson and no one attempted to obtain from McMullen his side of the story before deciding not to process a grievance. When Nagle attempted to press with Atkinson, Hehn and Vincer McMullen's case for processing a grievance the net result of the response in each case was there was nothing that Local 1000 could do. None of them sought to investigate further. When Nagle spoke to Vincer the last time before this complaint was filed, Vincer simply told Nagle that the time limits for filing a grievance had lapsed and Local 1000 could do nothing.
- (5) The procedure followed in Local 1000 for deciding whether to file a grievance for a member in a situation not involving the Program would involve the appropriate steward making the first inquiry and reporting the results to his chief steward who, in turn, may make his

own inquiry with Hydro's supervisory and personnel staff and possibly consult with a grievance officer at Local 1000's head office before deciding whether to process a grievance. If discharge is involved the chief steward would likely speak to the grievor, but would make the grieve/not grieve decision whether or not he got the employee's story directly from him. In most instances of discharge, the chief steward files either a notice of intent to grieve or a grievance even before making or completing any inquiries so as to protect against expiry of time limits.

25. On those facts, counsel argues, there has been a violation of section 68 of the Act because Local 1000's approach to McMullen's discharge effectively foreclosed him from the opportunity of having considered at arbitration the factors which an arbitrator would have considered. Instead his discharge has been accepted as being for just cause and as an appropriate penalty on the sole consideration that Hydro had followed the steps of the Program when it was applied to McMullen. Even if that result arises from actions taken by Local 1000 in the best of faith, counsel contends that the result is arbitrary and patently discriminatory treatment of McMullen.

26. The arbitrariness, according to counsel, is in the matter of fact way the decision not to grieve was made: simply, Hydro properly applied the steps of the Program, so there is no need to hear the employee's side of the story and there is no basis for a grievance. The discrimination with respect to McMullen is the consequence of the decision which was to deny McMullen the same chance to have an arbitrator consider his employment record, seniority, potential for rehabilitation and the economic impact of the action, a chance which would be available to employees with comparable work performance infractions, but unrelated to an alcohol problem. For the same reason, counsel argues that Local 1000's undertaking not to grieve mandatory referrals to the Program or discipline arising out of refusal or failure to comply with all of the conditions of a referral is, of itself, discriminatory.

27. Local 1000, counsel contends, by considering only whether the steps of the Program were followed, has failed to put its mind properly to whether McMullen's case was one of merit. This failure is of itself arbitrary and, compared with how Local 1000 would deal with other types of discharges, the failure amounts to discriminatory treatment.

28. Generally, with respect to employee grievances, section 68 of the Act requires a trade union to act fairly. Acting fairly in administering the grievance process does not impose an absolute requirement on the union to file a grievance for an employee, or take it to a particular stage of the process including final and binding arbitration. No entitlement is vested with employees in a bargaining unit to have grievances filed and processed through to arbitration or to any of the earlier stages, unless the collective agreement is worded to give them the right of carriage of grievances at one or more steps of the procedure. Nonetheless, unions must address employees' complaints and duly and deliberately consider their merits. The Board, when assessing unions' conduct in grievance processing will consider how a union arrived at the go/no go decision looking at such factors as whether it made a full and proper investigation, examined available evidence, attempted to clarify issues, heard the employee's side of the case and, if appropriate, discussed factors or issues in the complaint with the employer.

29. The issue in the instant case is simple at least in its clarity. Has Local 1000 failed in its section 68 duty to fairly represent McMullen because of Atkinson's decision, subsequently endorsed by Hehn and Vincer, not to process a grievance for him when he was discharged? It takes on complexity, however, in the context of the Program out of which the issue arises. Hydro introduced the predecessor program in 1969 to assist persons within its total employee population who were misusing alcohol and drugs and to assist it in dealing effectively with such employees. The J.A.C. recommended that the program be preserved with certain refinements, one of which was to incorporate the active support and participation of the organizations representing Hydro staff. Thus the original concept of the Program emerged at a time when there was a developing trend in the labour relations community to recognize potential for rehabilitation as a factor in dealing with employees embroiled in discipline generally, and particularly with respect to employees where misuse of alcohol was seen as a factor. See generally, D.J.M. Brown and D. M. Beatty, *Canadian Labour Arbitration* (Agincourt: Canada Law Book Limited, 1977) and the arbitration awards cited therein at pages 381-2. It is reasonable to presume that Hydro was responding substantially as well as temporally in 1969 to the concerns about alcohol and drug abuse in the workforce being expressed in arbitration awards and other forums. The express intent of Local 1000 and Hydro is to use the Program as a vehicle by which problems of unsatisfactory work performance, where misuse of alcohol or drugs is a factor, can be lifted from the mainstream of progressive discipline and be dealt with as a health problem. Such efforts deserve the support of tribunals like this Board or private arbitrators. At the same time, that support cannot be at the expense of depriving the very employees who are intended to be helped by those efforts of the protection of the legal framework which has developed around employee discipline in the labour relations context. The proper balance between those two competing interests is a delicate one.

30. The facts show that Local 1000 has accepted the treatment philosophy of the Program, including the constructive coercion concept. It has made a policy decision and given Hydro an undertaking not to grieve discipline or discharge arising out of mandatory referrals to the Program as long as Hydro has followed the steps of the Program in making the referral. The trade off for Local 1000 is that Hydro must notify it when Hydro is going to take action with an employee for documented unsatisfactory work performance in which Hydro suspects alcohol or drugs are a factor. That allows Local 1000 to verify the accuracy of the information and challenge it if not satisfied. This task falls to the chief steward. If the chief steward is satisfied that there is documented unsatisfactory work performance in which alcohol or drugs are a suspected factor and whether or not he participated in the employee's interview with Hydro, as Hehn described the process to the Board, the chief steward must advise the employee that:

- (1) his situation is serious;
- (2) it is important for the employee to comply with each step of the Program, including follow-up;
- (3) the consequence of a refusal or failure to comply with the program and continued unsatisfactory performance will be discharge; and
- (4) if he is discharged, Local 1000 will not file a grievance.

31. The Board disagrees with complainant counsel's argument that Local 1000's policy

decision and undertaking with Hydro violates its section 68 duty because application of the policy results in Local 1000 discriminating in its treatment of employees who are subjected to discipline and discharge arising out of the Program compared with employees who are disciplined for the same kind of infractions, but where alcohol or drugs are not a suspected factor. The discrimination, as the Board understands the argument, lies in the claim that the latter group of employees have normal access to the grievance procedure with the attendant opportunity of having their discipline tested against prevailing arbitral standards, while persons disciplined pursuant to conditions of referral to the Program are denied access to the grievance procedure and having their discipline tested at arbitration. Local 1000, for the reasons set forth in paragraph 7, made its decision to co-operate with Hydro in operation of the Program after participating in the J.A.C.'s recommendations arising out of its study of the predecessor program. It is obvious from those reasons that Local 1000 considered the Program to have benefit for all bargaining unit employees because, in cases of employees with unsatisfactory work performance records in which alcohol or drugs were a suspected factor, it treats the alcohol and drug problem as a disease instead of a matter for immediate discipline. Local 1000 accepted, as did Hydro and representatives of other hydro staff, the advice of experts that successful treatment depended upon the employees believing their referral to be a "last chance" to correct unsatisfactory work performance. It decided that filing grievances for employees who were disciplined for refusing or for failing to comply with the terms of referral would be inconsistent with that concept. Consequently, it agreed with Hydro that, if it properly followed the steps of the Program in making mandatory referrals, Local 1000 would not grieve discipline and discharges arising out of employees' failures or refusals to comply with the terms of their referral.

32. The Board is entirely satisfied that these were sound labour relations reasons for Local 1000's policy decision and that it was taken for the general benefit of the bargaining unit employees who are represented by it. The Board is satisfied also that Local 1000, when making its policy decision, sought to balance the value of the Program to all bargaining unit employees, and the need to enhance its effectiveness by supporting the constructive coercion concept on which it operates, with the interests of the employees who would be referred to it. The trade off for Local 1000 and those employees for the undertaking not to grieve discipline or discharge arising out of proper referrals, was that Hydro is obligated to keep Local 1000 fully informed of each step taken beginning with the alleged grounds for referral. If Local 1000 is not satisfied that there are proper grounds for the referral or with any of the steps, it can act then to protect the employees' rights by pursuing the grievance procedure. If that policy decision does in fact result in different treatment under the grievance procedure of employees disciplined for unsatisfactory work performance, depending upon whether alcohol was a suspected factor, there are cogent labour relations reasons for the difference. Under the predecessor program, Local 1000's opportunity to intercede came only after Hydro had discharged or otherwise disciplined the employee. By that time, the employee either could have committed an alleged disciplinable offense and have refused referral to the program, or had accepted referral to the program, but failed to comply with all terms of the referral. If Local 1000 could not resolve the discipline with Hydro, it would either have to drop the matter or rely on the uncertainty of arbitration. Whereas, the arrangement under the Program results in a *de facto* deferral by Hydro of its right to discipline an employee at the time of the work performance infraction, with the attendant risk of having its action challenged by Local 1000 through grievance procedure and arbitration; making the Program available in lieu of immediate discipline so that the root cause of the employee's unsatisfactory work performance can be treated; and making available to Local 1000 the information which, in the first place, would

have been the grounds for discipline. The *quid pro quo* for Hydro is the undertaking from Local 1000 that, if the employee still does not respond and unacceptable work performance persists, there will not be a grievance as long as Local 1000 is satisfied that Hydro has properly applied the Program. The net result of the bargain for Local 1000 and Hydro is that, in effect, they have the chance to make their best case for arbitration at the start of the referral because Local 1000 can grieve then if it is not satisfied with the grounds for, or terms of, referral and Hydro has the chance to reconsider its course of action.

33. If Local 1000 did not breach section 68 when it made its policy decision, the remaining issue is whether the application of that policy decision to the circumstances of McMullen's termination was arbitrary or discriminatory contrary to section 68 of the Act. The policy decision was applied by Atkinson when he told McMullen that Local 1000 would not file a grievance over his discharge. Hehn and Vincer later confirmed and upheld Atkinson's decision not to file a grievance for McMullen.

34. As the Board noted earlier in this decision, section 68 of the Act does not impose an absolute obligation on Local 1000 to file a grievance for the employees it represents, or process a filed grievance to arbitration or any particular step of the grievance procedure. See the Board's decision in *Nick Bachiu*, [1975] OLRB Rep. Dec. 919, at paragraph 12. Its decision at any point, however, is subject to scrutiny when there is an allegation that its decision breached the section 68 duty, whether by an act of omission or commission. In a frequently quoted passage of the Board's decision in *Walter Princesdomu and C.U.P.E. Local 1000*, [1975] OLRB Rep. May 444, the Board, in the process of interpreting the "arbitrariness" in the section 68 duty, made the following comment.

Accordingly at least flagrant errors in processing grievances – errors consistent with a "not caring" attitude – must be inconsistent with the duty of fair representation. An approach to a grievance may be wrong or a provision inadvertently overlooked and section 60 [now section 68] has not application. The duty is not designed to remedy these kinds of errors. But when the importance of the grievance is taken into account and the experience and identity of the decision-maker ascertained the Board may decide that a course of conduct is so implausible, so summary or so reckless to be unworthy of protection. Such circumstances cannot and should not be distinguished from a blind refusal to consider the complaint.

35. When Atkinson informed McMullen that his discharge was not grievable, he had made that decision after verifying that Hydro had correctly applied the Program to McMullen on each of the two mandatory referrals. Those conditions having been met, Atkinson decided that Local 1000's policy decision applied to McMullen's circumstances. By then McMullen had twice been referred to the program for separate unsatisfactory work performance infractions, both of which he admitted were grounds for Hydro to either issue discipline or put him on the Program. McMullen also understood, at least with respect to the second referral, that his job was at risk. When McMullen did not protest these actions, Atkinson can hardly be faulted if he took at face value the grounds for the referrals set out in Hydro's memoranda to McMullen. McMullen was clearly on notice as to what conduct and work performance were required of him when he committed the third and final infraction. Atkinson did not base his decision to not file a grievance on those circumstances, however. Rather he based it on the fact that Hydro had satisfied the conditions precedent to the application of Local 1000's policy

decision. As the Board has already stated, there are sound labour relations reasons for that policy.

36. Atkinson failed to communicate to McMullen the reasons for his decision and in so doing deprived himself of the opportunity to hear McMullen's side of the story. A failure to communicate the basis for his decision, however, does not by itself trigger a violation of section 68. See *Sofley Cartage Limited*, [1982] OLRB Rep. May 766, at paragraphs 28 and 29. In any event, even if Atkinson's failure to communicate the reasons for his decision might have provided the foundation for a section 68 violation, that defect was cured when the reason for the decision was eventually forthcoming from Hehn and Vincer after Nagle intervened on behalf of McMullen. They also heard and answered his concerns about extenuating circumstances. While Nagle did not get the response he was looking for, they did hear him out and their responses were consistent with what they told him was Local 1000's policy with respect to the Program and discipline arising out of it. Furthermore, Vincer's review of Atkinson's handling of McMullen's discharge was in response to Nagle's first contact with him. Vincer confirmed for himself, from his review of Atkinson's file on McMullen and from talking to Atkinson that it was proper to apply Local 1000's policy decision to McMullen's circumstances and not file a grievance. It was Vincer's testimony that it would seriously undermine Local 1000's credibility with Hydro and the effectiveness of the Program if Local 1000 went back on its undertaking in McMullen's case. Therefore, through Nagle's intercession with Hehn and Vincer, McMullen got the hearing which Atkinson failed to give him.

37. The Board does not view Vincer as having taken shelter under a technicality when, having failed or refused to have the grievance taken up, he commented to Nagle on their final contact that the time limits for filing a grievance had lapsed. There is no evidence that his position on the merits of McMullen's request that a grievance be filed had changed, or reasonably should have changed, from the prior contact. Nor is there any evidence that either Hehn or Vincer said or did anything which would give McMullen reasonable grounds to expect that Local 1000 might file a grievance.

38. Atkinson's failure to follow the procedures laid down by Local 1000 for its chief stewards with respect to their responsibilities towards employees who receive mandatory referrals to the Program does give the Board cause for some concern, even though the failure is not a breach of section 68. By not confirming the alleged unsatisfactory work performance infractions and by not talking to McMullen he ran the risk of depriving himself of information relevant to Local 1000's section 68 duty not to be arbitrary in its representation of McMullen. The same might be said for Atkinson's failure to inform McMullen that Local 1000 would not file a grievance if he failed or refused to comply with a proper mandatory referral. Either failure made no difference in this case because Atkinson would not have discovered anything which reasonably would have caused him to alter his decision. McMullen did not dispute the grounds for each referral at the time and acknowledged before the Board that Hydro had grounds for its actions. In another case either step might evoke a response from the employee which directs the chief steward to new and relevant facts. The section 68 duty aside, if it is inconsistent with the concept of constructive coercion for the Local 1000 to grieve discipline arising out of proper mandatory referrals it is equally inconsistent with the concept for the chief steward not to caution the employee to that effect. That very advice would reinforce the "last chance" aspect of the Program. If Local 1000's chief stewards ignore the procedures which it has said are their duty, the union runs the risk of becoming "mechanical" in its dealing with the problems of employees who are intended to be helped by the Program and

thus diminishing its effectiveness. Failure to follow its own procedures may also be viewed by the Board as an unwillingness or lack of effort to meet a reasonable standard of communication with employees referred to the Program, bringing into question both the basis of the policy decision and whether it was being applied in an arbitrary manner. See, for example, the caution expressed by the Board in *Sofiley Cartage, Supra*, at paragraph 29, with respect to the failure of trade union officials to communicate to employees information essential to the employees' understanding of the efforts being made by those officials to resolve job security concerns of the employees:

“... the mere unwillingness or lack of effort to communicate, if unreasonable, may in itself point in the direction of conduct which is arbitrary, discriminatory or in bad faith and cause the Board to view with particular attention the actual level of representation afforded by the trade union.”.

39. To summarize, the evidence establishes that there were sound labour relations reasons for Local 1000's policy position to support the Program, including its undertaking with Hydro not to file grievances when employees, properly referred to the Program by Hydro, are disciplined or discharged for refusing or failing to comply with the terms of mandatory referral. Atkinson's decision not to file a grievance for McMullen was based on Local 1000's policy decision and was made after he determined that Hydro had satisfied the conditions precedent for the policy decision to be applied. While Atkinson did not communicate to McMullen the reasons for his decision, the failure was later rectified by Hehn and Vincer. Atkinson also failed to follow the procedures established by Local 1000 for dealing with employees being placed on mandatory referral to the Program. Had he followed them he would not have learned anything which reasonably would have caused him to challenge the referrals. When Atkinson made his decision not to grieve the discharge and when Hehn and Vincer confirmed it, they knew that Hydro had referred McMullen to the Program twice on grounds of documented unsatisfactory work performance and with evidence in each instance of an alcohol problem. They knew, too, that he had been clearly warned in writing of the possibility of discharge on the first referral and, on the second one, he had been warned twice that discharge would be the result of his failure to comply with its terms. The first referral was for reporting to work under the influence of alcohol and in that condition driving a Hydro vehicle onto a public street where he was stopped by a Hydro supervisor, returned to the Hydro yard and then taken home for the day. The second one was for unauthorized absence for one week. They knew also that the final incident was a two-week unauthorized absence involving alcohol. Therefore, McMullen had been given two chances to correct his unsatisfactory work performance and was seeking one more “final” chance by asking Local 1000 to file a grievance for his discharge.

40. On those facts and all of the evidence herein, it cannot be said that the manner in which Atkinson, Hehn and Vincer dealt with McMullen in refusing to file a grievance for him was, in the words of the Board in *Walter Princesdomu, supra*, “... consistent with a ‘not caring’ attitude”, or was conduct “... so implausible, so summary, or reckless to be unworthy of protection.”. Therefore, Local 1000 has not treated McMullen in an arbitrary manner contrary to section 68. Nor do those facts and the evidence herein support a finding that the decision not to grieve his discharge resulted in discriminatory treatment. The decision not to grieve his discharge was made on the basis of Local 1000's undertaking with Hydro, a policy decision which the Board has found to be based on cogent labour relations reasons, in an individual fact situation wholly consistent with the reasons underlying the policy. Finally,

McMullen's counsel has acknowledged that there was no ill will behind Local 1000's decision not to file a grievance for McMullen. Therefore, it has not acted in bad faith. Accordingly, there has been no violation of section 68 of the Act and Local 1000 has not failed in its statutory duty of fair representation as defined by that section.

41. This complaint is dismissed.

1987-83-U The Ontario Public Service Employees Union, Complainant, v. The Children's Aid Society of Ottawa-Carleton, Respondent

Interference in Trade Unions – Unfair Labour Practice – Employee acting in capacity of union president attempting to enforce union constitution on employee – Employer using threat of discipline to control union official's discharge of duties unlawful – Whether protection in Act for union activity can be waived by contract

BEFORE: Richard M. Brown, Vice-Chairman, and Board Members C. A. Ballentine and J. Wilson.

APPEARANCES: *P. A. Sheppard, Bernie Farber, Sherill Murray and Jeff Walker for the complainant; A. P. Tarasuk and J. Messner for the respondent.*

DECISION OF THE BOARD: February 21, 1984

1. This complaint questions the authority of an employer to issue directions to an employee, who is also a union officer, concerning the conduct of affairs associated with that office. The Ontario Public Service Employees Union ("OPSEU") initiated proceedings against the Children's Aid Society of Ottawa-Carleton (the "Society"), under section 89 of the *Labour Relations Act*, alleging a violation of sections 64 and 66(c).

I

2. The union officer is Bernie Farber who has been the president of OPSEU Local 454 since June, 1982. He is also a social worker in the employ of the Society. The employer sought to inquire into discussions between Mr. Farber and Lyne Sylvestre, a child care worker and fellow employee. Throughout the events in question, all concerned – including Ms. Sylvestre – were under the false impression that she was a union member.

3. The triggering event was a telephone call made by Mr. Farber on September 16, 1983. He believed that he had reached Lynn Lamer, another employee, but he was in fact talking to Lyne Sylvestre. Sylvestre works at the residential treatment unit where Lamer resides. Farber was calling about an oral warning recently received by Lamer. According to Sylvestre, when she answered the phone, Farber used only a first name to identify the party with whom he wished to speak. She testified that he mentioned an oral warning recently issued by the employer, referred to the supervisor involved, Gilbert Gervais, as a "prick" and encouraged her to grieve. According to Farber, he asked to speak to Lynn Lamer, suggested that

a grievance be considered, but did not use the word “prick”. Before the conversation ended, both parties realized that a mistake had been made.

4. Lyne Sylvestre reported this conversation to Gilbert Gervais who is her supervisor. Gervais in turn informed Mr. C. Chafe, the director of treatment services, who suggested that Sylvestre take the matter up with the union. Sylvestre wrote to Mr. Farber, objecting both to his carelessness in disclosing a warning given to a fellow employee and to his description of Mr. Gervais. (In the letter, Sylvestre referred to herself as a union member. Apparently, everyone who saw the letter assumed she was right.) Mr. Gervais arranged to have this letter typed and mailed it. Farber replied by letter, inviting Sylvestre to meet with him to discuss the matter. There was another exchange of letters between them, and two or three telephone conversations. To this point, nothing had been resolved. She was still unsatisfied with his response to her first letter. He wanted to meet with her, but she insisted upon a full answer in writing. Meanwhile, the September 16th telephone conversation was raised at a joint consultative committee meeting on September 29th. When the chief steward, Mr. J. Walker, said that staff morale was threatened by the employer’s approach to discipline, Mr. Chafe replied that a union officer had acted in a way that undermined morale. Chafe then stated that Farber had encouraged an employee to grieve and had called a supervisor a “prick”. Farber denied using this word. A few days later, Chafe obtained a copy of Sylvestre’s letter to Farber and showed it to Joseph Messner, the Society’s executive director. Messner then wrote to Farber, asking for his comments on Sylvestre’s accusations. Farber visited Messner in his office and assured him that the word “prick” had not been uttered. The minutes of the September 29th joint consultative committee meeting, in their original form, made no mention of the September 16th telephone conversation. At the next joint consultative meeting, Mr. Messner referred to this oversight. According to Chafe, Farber said the conversation was an internal union matter and Messner agreed that it would not be the subject of further discussion.

5. A union membership meeting was held on October 19th. Without identifying Lyne Sylvestre by name, the union executive announced that a union member had disclosed to management a conversation with a union official. The discussion revolved around article 22.1(g) of the constitution:

22.1 Any member of the Union shall be deemed to have committed an offence against the Union if s/he:

• • • •

(g) Publishes or circulates, either within the Union or outside, false reports or mis-representations about the Union or any Officer or member of the Union with respect to the activities of the Union or members in their capacity as members.

According to Sherill Murray, secretary of Local 454, members were concerned about a possible “breach of confidentiality” and directed Farber to pass their concern on to the member concerned, saying that charges could be laid, but would not be in this case.

6. Farber telephoned Sylvestre on November 3rd. According to Sylvestre, he said that some “sisters and brothers” wanted to charge her under the union constitution for breach of confidentiality, but he was opposed to bringing charges. She testified that he also mentioned

expulsion from membership as a possible penalty. According to Farber, he said union members were concerned there may have been a breach of confidentiality, but he made no mention of charges or expulsion. They agreed to meet at noon on November 8th. Sylvestre then called Gervais and recounted her version of her most recent conversation with Farber. The next day Gervais passed this information to Chafe. He called Sylvestre and learned she was reluctant to meet Farber. Chafe then reported what had transpired to Messner.

7. Messner decided to investigate the alleged “threat” relating to charges or expulsion by calling Sylvestre and Farber to his office for a meeting at 11:00 on November 8th – one hour before Farber was scheduled to meet with Sylvestre. Prior to the meeting, Messner and Farber conversed over the telephone about the union president’s attendance at the meeting called by the executive director. According to Messner, when Farber expressed his reluctance to attend, Messner “let him know he was expected to be there”, and said a decision to impose discipline might be made in his absence if the “threat” was proven. By this time, Messner had consulted the city’s solicitor about whether an employee could be required to attend a meeting and what could be done if the request was refused. According to Farber, he told Messner the issue was an internal union matter, and Messner replied that he did not wish to issue an order to attend, but suggested he would if necessary.

8. What Messner had planned as an informal gathering turned into an adversarial confrontation. Farber was accompanied by Walker and Sherill Murray whose minutes of the meeting were introduced into evidence. Chafe also took minutes which were not produced at the hearing. The minutes taken by Murray indicate that the union officials advised Messner that the matter was an internal union affair. Messner responded that the alleged “threat” was a corporate matter and admitted telling Farber that a failure to attend would lead to a disciplinary letter. At one point, Messner stated that the purpose of the meeting was to ascertain the facts, but he later said that he would be the one to determine if what had happened was appropriate. When Walker suggested that the union officials might leave, Messner replied that employees are required to meet with him. Walker then advised the executive director that he was in contravention of the *Labour Relations Act*. The meeting ended, having produced more heat than light. Two days later Messner wrote to Farber saying that, in the absence of a denial by Farber, the employer must assume the “threat” had been made. Messner also requested Farber in future both to refrain from making threats and to abide by the spirit of the collective agreement in a joint effort to resolve grievances. The letter was addressed to Farber as president of the local union.

9. Putting these recent events to one side, both Farber and Messner described their collective bargaining relationship as harmonious.

10. Counsel for the Society referred us to the following articles in the collective agreement:

ARTICLE 3 – NO DISCRIMINATION

- 3.01 The Society and the Union agree that there will be no intimidation, discrimination, interference, restraining or coercion exercised or practised by either of them or by any of their

representatives or members because of any employee's membership or non-membership in the Union or because of her activity or lack of activity in the Union.

ARTICLE 5 - MANAGEMENT RIGHTS

5.01 The Union recognizes and acknowledges that the management of the Society's operations and direction of the employees are fixed exclusively in the Society and, without restricting the generality of the foregoing, the Union acknowledges that it is the exclusive function of the Society to:

- (a) maintain order and efficiency;
- (b) hire, promote, demote, classify, transfer, layoff, suspend and re-tire employees, and to discipline or discharge any employee provided that a claim by an employee who has acquired seniority that he has been discharged or otherwise disciplined without just cause may be the subject of a grievance and dealt with as hereinafter provided;
- (c) make, enforce, and alter, from time to time reasonable rules and regulations to be observed by the employees, provided that they are not inconsistent with this agreement;

ARTICLE 10 - POLICY GRIEVANCES

10.01 It is understood that the Society may bring forward at any meeting held with the Union Executive Committee any complaint with respect to the conduct of officers, committee members or Union representatives, and if such complaint by the Society is not settled to the mutual satisfaction of the conferring parties it may be treated as a grievance and referred to Step 2 in the same way as a grievance of an employee.

II

11. This complaint is brought under sections 64 and 66(c).

64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

66. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

(c) shall seek by threat or dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

12. A person who is both an employee and a union official sometimes wears one hat and sometimes the other, and an employer's lawful disciplinary authority is determined by the role being played at any particular time. So long as the individual in question is engaged in the role of an employee, he or she is subject to employer direction, and to resulting penalties for non-compliance, in the same way as any other employee. Consider, for example, the case of a union steward who takes a day off work, without permission, to go fishing, and who is disciplined for this unauthorized absence. These facts obviously disclose no violation of the *Labour Relations Act*, because any employee – union official or not – who acts in this way merits discipline.

13. But a person who plays the role of union official is viewed differently by the law. Section 3 recognizes an employee's right to "participate" in the "lawful activities of a trade union": this right includes the right to discharge the responsibilities entailed by union office. Section 66(a) prohibits an employer from disciplining, or threatening to discipline, an employee for exercising any right under the Act. See generally *St. Catherines General Hospital*, [1982] OLRB Rep. Mar. 441 at para. 34 to 38 and *United Steelworkers of America and Inglis Ltd.*, (1977) 77 D.L.R. (3d) 722 (Ont. Div. Ct.).

14. One of the primary responsibilities of many union officials is processing grievances over alleged contractual violations. The enforcement of an agreement by union representatives is an essential part of the collective bargaining process. In other words, section 66(c) prohibits an employer from disciplining a union steward for submitting a grievance. See *Valdi Inc.* [1980] OLRB Rep. Aug. 1254 and *Silknit Limited*, [1983] OLRB Rep. Aug. 1362. An employer who followed this course would also run afoul of section 64 by interfering in the administration of a trade union.

15. This does not mean that representatives of a union are immune from discipline in the grievance process. But the weight of authority suggests that a union official engaged in processing grievance enjoys some protection, under the Act, from discipline for conduct that if carried on while wearing only his or her employee hat would be insubordinate. In *Valdi Inc.*, *supra*, the Board quoted with approval an arbitration award that recognized the need to ensure that union officials are not deterred by discipline from carrying out their duties:

For the purposes of assessing whether or not conduct is insubordination the standard of conduct that the company is entitled to expect should be different when applied to the acts of union committeemen engaged in the legitimate discharge of their duties. For, ... a committeemen is, while attempting to resolve grievances between employees and company personnel, always functioning on the border line of insubordination. His role is to challenge company decisions, to argue out company decisions and, if the discharge of that role he is to be exposed to the threat of discipline for insubordination, his ability to carry out his role will be substantially

compromised. This is not to say that a committeeman has a *carte blanche* to ignore at will management instructions and to instruct others not to carry them out. His immunity, if it may be called that, is limited to acts or omissions committed in the discharge of his functions and to acts or omissions which may reasonably be regarded as a legitimate exercise of that function. To put it succinctly, a committeeman is not entitled to punch a foreman in the nose as one of his means of attempting to bring about a settlement of a grievance. (*Firestone Steel Products*, (1975) 8 L.A.C. (2d) 164 (Brandt).

The National Labour Relations Board has followed a similar course. In *May Dept. Stores Co.*, 220 NLRB 1096, 90 LRRM 1444 (1975), enforced 555 F. 2d 1338, 95 LRRM 2657 (CA 6, 1977), that Board found an employer had committed an unfair labour practice by discharging a union steward for being rude to a manager in the course of a heated debate over a jurisdictional grievance. But the NLRB has declined to protect a union official whose conduct is "extraordinarily obnoxious, wholly unjustified, and departs from the *res gestae* of the grievance procedure." See *Union Fork & Hoe Co.*, 241 NLRB 901, 101 LRRM 1014 (1979).

16. This Board has also considered the shelter afforded by the Act to a union official who publicly criticizes management's bargaining stance, either mid-contract or during negotiations to renew a collective agreement. As in the grievance process, a union representative enjoys some degree of protection, but not complete immunity. See *St. Catharines General Hospital*, *supra*. In the circumstances of that case, the Board found a public statement was protected activity.

17. Some union officials also attend to internal union affairs, such as policing adherence to the constitution by union members. Like grievance processing and negotiations, this activity is an integral part of our system of free collective bargaining. The constitution of a trade union defines the powers of officers as well as the rights and obligations of members. Without a constitution, an association of employees cannot function fairly and effectively as a trade union. This is why an applicant for certification must demonstrate that it has a valid constitution before the Board treats it as a trade union entitled to be certified as a bargaining agent. See *Tridon Limited*, [1974] OLRB Rep. Jan. 16. The importance of a union's internal laws to collective bargaining does not end upon certification. The ongoing interest of a trade union in enforcing its constitution must be shielded from an employer's disciplinary power. Management cannot punish, or threaten to punish, an official merely for enforcing the union's internal laws. The conduct of such internal union affairs is protected from discipline by sections 64 and 66(c).

18. The focus of the discussion to this point has been the use of discipline to control the activities of a union official. We turn now to consider the invocation of punishment by management to compel an official to divulge information about union activities, such as policing its constitution or enforcing a collective agreement. Does an employer have the lawful authority to compel a union representative to disclose discussions with a grievor or with an employee who is alleged to have contravened the constitution? The answer is no, because discipline skews the balance of power that the *Labour Relations Act* is designed to achieve between union and employer. The use of an employer's disciplinary power upsets the balance

in two ways: by undercutting the standing of union officials who are subordinated to management; and by allowing the employer an unfair advantage, over the union, in access to information – information that translates into power. An employer who invokes discipline to obtain such information from a union official thereby contravenes sections 64 and 66(c).

19. The use of discipline is what taints management's actions with illegality, not its interest in union activities. This Board has recognized that, depending upon the context, an employer may have a legitimate interest in the laying of charges against a union member, and that management may lawfully use its economic power, at the bargaining table, to persuade a union not to take such action. In *A. N. Shaw Restoration Ltd.*, [1976] OLRB Rep. Sept. 504, the employer sought a "no reprisals" clause that would have prevented the union from disciplining employees for working through a strike. The Board found no interference with the administration of a trade union, but noted that the use of economic leverage to influence union affairs would not be legal in all cases:

Section 56 [now 64], in our opinion, cannot be construed as creating a violation on every occasion where a collective agreement, or proposed collective agreement, may conflict with the conduct of internal union affairs. In fact, there is good authority for the proposition that, in certain circumstances, the collective agreement takes precedence over the internal constitutional arrangements of a trade union. See *Orenda Engines Ltd.*, (1958), 8 L.A.C. 116 (Laskin); *Leader Masonry and Forming Ltd.*, [1964] OLRB Rep.156. It does not follow from these cases, however, that any collective agreement provision is justified, regardless of the degree to which it affects the conduct of union affairs. It is possible to contemplate certain contractual provisions, such as one dictating the composition of a union's executive, that would effectively undermine the independence of the bargaining agent so as to constitute interference as contemplated by section 56 [now 64]. The distinction between merely affecting internal union affairs appears to be one of degree. Some attempt, therefore, must be made to measure the impact of this kind of employer conduct upon the union, the question being whether the conduct of the employer affects the internal affairs of the union to such an extent as to threaten the existence of the union as a viable bargaining agent....

The no-reprisal clause that the respondent insists upon in this case is, in our opinion, just part of the normal wear and tear of collective bargaining. Undoubtedly, this restriction upon the power to discipline its members is unpalatable to the complainant, since it may affect its credibility with those members who did engage in the strike. On the other hand, it would appear that the respondent, although obviously attempting to maintain its credibility with the three employees that continued to work for it during the strike, was not attempting to undermine the existence of the union as a viable bargaining agent. The conduct of the negotiations clearly indicated the respondent's intention to continue to recognize the complainant as bargaining agent for its employees. Moreover, it should be pointed out that protection for the three employees also could have

been achieved through the negotiated alteration of the union security provision, a more drastic, but nevertheless legal, approach.

20. Can the statutory prohibition against disciplining union officials be waived in a collective agreement? All that need be said for present purposes is that any contract that does not expressly say that union officials are subject to discipline cannot be interpreted to waive the protection that is a central part of the legislative scheme. However, if a more definitive answer were necessary we would be strongly inclined to respond in the negative. A waiver of the statutory protection against discipline is tantamount to a negation of the rights enshrined in section 3. In *United Steelworkers of America and Inglis Ltd.*, *supra*, section 3 was said to “guarantee” the right of an employee to participate in the activities of a trade union. The Court struck down an arbitration award which purported to curtail that right by precluding the grievor from holding union office for a period of two years. This holding strongly suggests that the right, *guaranteed* by statute, to carry out the duties of union office cannot be overridden by contract. In the passage from *A.N. Shaw Restoration Ltd.*, quoted above, the Board said a collective agreement that dictated the composition of the union executive would constitute unlawful interference in the administration of a trade union. The implicit message in this observation is that the protection provided by section 64 cannot be abrogated by contract, at least in these circumstances. In other jurisdictions, the right to participate in an organizing campaign has been held to survive the negotiation of a collective agreement that purports to prohibit such conduct. See *NLRB v. Magnavox Co.*, 415 U.S. 322, 85 LRRM 2475 (1974); and *Cominco Ltd.*, [1981] 3 CLRBR 499 (B.C.).

III

21. The collective agreement before us does not explicitly purport to allow the employer to discipline a union official for performing the duties of his or her office. The power to discipline, found in article 5.01, is far too general to disclose an intention to override statutory safeguards. Article 3.01 does place certain restraints upon union representatives in their dealings with employees. (We need not decide whether or not those restraints are legal under the test set out in *A. N. Shaw Restoration Ltd.*, *supra*.) And article 10.1 provides for the enforcement of the restraints found in article 3.01 through the grievance and arbitration process. In the event of stone walling by the union, the remedy for management contemplated by these articles is arbitration, not discipline.

22. The Society has contravened sections 64 and 66(c), even if all of the conflicts in the evidence were to be resolved in management’s favour. Messner held the meeting of November 8th to discuss the conversation between Farber and Sylvestre on November 3rd. Before calling the meeting, Messner had been informed of Sylvestre’s recollection of this telephone call – according to her, Farber said that some members wanted to charge her for breach of confidentiality, that expulsion was a possible penalty, but that he was opposed to charges. Messner, like everyone else who saw the letter in which Sylvestre described herself as a union member, assumed that she was indeed a member of the union. When Messner spoke to Farber on the telephone about his attendance at the meeting, the president of Local 454 said his discussion with Sylvestre was an internal union matter. This characterization was perfectly consistent with everything Messner had already learned from other sources. Yet the executive director insisted that Farber attend a meeting to discuss this matter and told him that he might be disciplined in his absence if Sylvestre’s accusations proved to be true. At

the meeting on November 8th, Messner again stated that union officials are required, as employees, to meet with the executive director. Messner also stated he would be the one to decide if Farber's conduct was appropriate. Even if the only purpose of the meeting was to investigate what had transpired, the threat of discipline was invoked to compel a union official to divulge information about the manner in which he had discharged the responsibilities of his office. However, in our view, Mr. Messner intended to do more than investigate. Messner believed that if Sylvestre's accusations were true, Farber had behaved improperly, and he was determined to prevent a reoccurrence. This message was clearly conveyed to the union president. In short, the threat of discipline was used in an attempt to control the conduct of a union official. We express no view on the wisdom of Mr. Farber's conduct. Although some of his actions may have been ill advised, he did not exceed bounds within which his conduct was protected.

23. Counsel for the union asked the Board to direct the Society to post a notice acknowledging a violation of the Act. We decline to direct a posting because a mere declaration that the Act has been contravened is a sufficient remedy in the circumstances. The effect of the violation was restricted to union officials who will no doubt learn of the Board's decision in the absence of a posting. Moreover, the local union president described this collective bargaining relationship as harmonious, excepting the isolated events recounted above.

CONCURRING DECISION OF BOARD MEMBER J. WILSON;

1. This complaint came to the Board because the Society was responding to allegations made by one of its employees about the conduct of the union's president towards her. It is clear from the evidence, and I agree with my colleagues' findings of fact, that Mr. Messner was attempting to resolve a problem between Ms. Sylvestre and Mr. Farber that was created by Mr. Farber. I am satisfied that Mr. Messner was acting in good faith for the purpose of achieving an amicable resolution of the dispute between Mr. Farber and Ms. Sylvestre when he called the meeting for November 8th. I am convinced that he did not want to interfere in the internal affairs or administration of the union. However, I must agree with the majority in holding that the conduct of Mr. Messner was a violation of the Act, albeit a technical one, caused in large part by the stance taken by the union president throughout the period from his phone call of September 16, 1983, to the meeting of November 8th.

2. I have had difficulty in reconciling the evidence presented by the parties. By putting all the events that transpired in chronological order, and using the dates given by both sides which corresponded very closely, I find the evidence given by Ms. Sylvestre to be much more believable than that of Mr. Farber.

3. Ms. Sylvestre's evidence was borne out in certain relevant parts by that of Mr. Messner and Mr. Chafe. Mr. Farber's evidence was supported by that of Sherill Murray in the matter of the union's general meeting but her evidence also supported that of Ms. Sylvestre in certain areas, in particular the November 8th meeting. No other evidence was called to support Mr. Farber's contentions.

4. Mr. Farber laid great stress on Ms. Sylvestre having breached union confidentiality with her letters which were copied to Mr. Gervais. It was apparent to me that Mr. Farber's dependence on the union's constitution was selective. While it is conceded by everyone that Ms. Sylvestre was not a union member she was perceived by everyone to be one and thought

so herself. While applying Article 22 of the Constitution in respect to a “breach of confidentiality” by Ms. Sylvestre, Mr. Farber overlooked section 22.4.1. which required a written charge within 45 days and section 22.4.2 which required a union member as a mediator in such cases. Surely Mr. Farber cannot be both a protagonist and a mediator.

5. I next turn to Mr. Farber’s mandate from the union membership. Sherill Murray’s evidence was that she didn’t believe Article 22 of the Constitution was read out at the General Meeting and that she did not believe the members had copies of the Constitution. It is also significant that while the Constitution requires an Executive Meeting at least every three months and a General Meeting at least twice a year, in this case the union happened to have an Executive Meeting on October 13th – one day after Mr. Messner talked to Mr. Farber about the incident – and a General Meeting on October 19th – one day after a memo from Mr. Messner to Mr. Farber.

6. While I believe that Mr. Messner’s violation of the Act was at least honestly motivated, I cannot look at Mr. Farber’s actions in the same light.

7. Nevertheless, the clear undisputed fact remains that Mr. Messner did threaten to impose discipline unless Mr. Farber attended a meeting to discuss what can only be characterized as an internal union matter. Unfortunately, despite the most honourable of intentions, an employer cannot under the *Labour Relations Act* use its disciplinary powers to intervene in such matters.

8. For these reasons, I have joined with the majority in issuing the declaration of a violation of the Act.

1357-83-R; 1470-83-U Hotel Employees and Restaurant Employees Union, Local 75, Applicant/Complainant, v. **The Polish Alliance Friendly Society of Canada**, Branch No. 19, Social Club, Respondent, v. Group of Employees, Objectors

Bargaining Unit – Certification Where Act Contravened – Change in Working Conditions – Unfair Labour Practice – Evidence relating to irrelevant petition admitted to establish employer misconduct – Reduction of hours after Board notice posted unlawful – Bartenders and waiters not “salesmen” – Interim certificate issued under section 8 pending resolution of bargaining unit dispute

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members I. M. Stamp and H. Kobryn.

APPEARANCES: *W. Dubinsky for the applicant/complainant; James P. Garofalo and Bogdan Piatkowski for the respondent; no one for the objectors.*

DECISION OF THE BOARD; February 27, 1984

1. The proceedings in these two files were consolidated when they first came on for hearing before the Board. The application in Board File No. 1357-83-R is an application for

certification in which the applicant subsequently requested that the Board apply section 8 of the *Labour Relations Act* should the applicant not have adequate membership support for certification without a representation vote. Board File No. 1470-83-U is a complaint filed under section 89 of the Act in which it is alleged that the respondent has violated sections 66 and 79 of the Act.

2. Following the first hearings into these matters, the Board issued an interim decision setting out the procedural issues that arose and rulings thereon which had been dealt with in those hearings, including authorizing a Board Officer to inquire into and report to the Board on the community of interest, if any, between persons employed by the respondent as musicians and cleaners and other employees in the bargaining unit sought by the applicant. The applicant takes the position that they should be excluded and the respondent takes the contrary position. Subsequent to that decision, the Board Officer's report was issued to the parties and further hearings were held to hear the balance of the evidence and representations of the parties on the outstanding issues, including their submissions on the conclusions which the Board should make from the Officer's report.

3. The Hotel Employees and Restaurant Employees Union, Local 75 ("Local 75") seeks to represent employees in a bargaining unit described in the following terms:

All employees of the respondent in Thunder Bay, Ontario, save and except supervisors, persons above the rank of supervisor, sales and office staff, musicians and cleaners.

In addition to the dispute over whether musicians and cleaners are to be included in or excluded from the unit, the respondent contends that there is no appropriate unit which can be described in terms of "all employees of the respondents", as sought by Local 75 which purports not to include sales staff because all of the employees who would ordinarily fall within the inclusive part of the description, including musicians and cleaners, are "sales staff". The result, counsel argues, is a nullity since the employees who would be captured by the inclusive part of the description would be eliminated from the unit by the exclusion "sales staff".

4. The unit which Local 75 seeks, while described in terms of all employees, is a unit comprised of bartenders, waiters and waitresses. Respondent counsel argues that the respondent's business is the sales and service of alcoholic beverages in the Social Club and that the bartenders who prepare the drinks for the customers, the waiters/waitresses who serve the drinks to the customers, the musicians who provide entertainment for the customers and the cleaners who maintain the Club premises are all engaged in the activity of selling the respondent's "products and services". That is the whole purpose of their employment according to counsel. He argues that, because of that nature of their work, they cannot be fitted into the standard type of bargaining unit usually found by the Board to be appropriate for collective bargaining purposes. Counsel was referring to what has become known as a standard "production" unit and is typically described in terms of all employees of the employer excluding, *inter alia*, "office and sales staff". The applicant, respondent counsel contends, by describing the unit it seeks in those terms has effectively excluded the very employees it wants to represent and, in the result, the unit it has described is a nullity. Counsel was relying as well on the definition or meaning given in Webster's New Collegiate Dictionary to "salesman" as a person who sells and "sales people" as persons employed to sell goods or services. The

selling takes place in the respondent's business when the alcoholic beverages are prepared by the bartenders and served by the waiters/waitresses to the customers.

5. When the Board is determining an appropriate bargaining unit, craft units generally excluded, it has followed a practice of describing them in terms of the specific groups of employees who are *not* to be included in order to keep to a minimum the argument of whether new or amended job classifications which may appear subsequent to certification are to be included. Thus the Board describes a production unit in terms of all employees of the employer excluding foremen, persons above the rank of foreman, office and sales staff; or an office unit in terms of all office, clerical and technical employees. The terms "office and sales staff" used to describe the exclusion from a production unit is a broad term intended to exclude office staff and sales staff which may, in any given situation, include employees in a variety of job classifications. The Board has issued many certificates to the applicant and its sister locals (except when granting craft units) describing the bargaining units in terms of all employees with the description of the exclusion depending on the nature of the employer's operations.

6. There is no doubt whatsoever in the instant case which employees the applicant is seeking to represent by its proposed description and the Board is satisfied that the term sales and office staff does not capture them. The Board is satisfied, therefore, that a bargaining unit described in terms of all employees of the respondent and excluding, amongst others, sales and office staff, would be a unit of employees appropriate for collective bargaining purposes whether, in the final analysis, it excludes or includes cleaners and musicians. The Board reserves its decision, however, on whether cleaners and musicians should be included in or excluded from the bargaining unit.

7. Local 75 has alleged that the respondent reduced the regular hours of work for Jolanta (Julie) Rysinski, June McKenzie, Helen (Lil) Laprade and Mary Stefanowski because they had supported Local 75's organizing activities and, in doing so, the respondent has violated sections 66 and 79 of the Act. As a result of these alleged violations, Local 75 contends that the true wishes of the employees are not likely to be ascertained. Therefore, should Local 75 not have sufficient membership support for certification without a representation vote, it has requested that the Board certify it pursuant to section 8 of the Act. Section 8 provides as follows:

8. Where an employer or employers' organization contravenes this Act so that the true wishes of the employees of the employer or a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

Section 8 gives the Board the discretion to certify Local 75 without requiring it to satisfy the requisite levels of membership set out in section 7 if it establishes that:

- (1) the Act has been violated;

(2) the true wishes of the respondent's employees are not likely to be ascertained; and

(3) in the Board's opinion, Local 75 has membership support adequate for collective bargaining purposes.

8. The bargaining unit described by Local 75 is comprised of eight employees. The bargaining unit proposed by the respondent would include 13 employees. Those descriptions define the minimum and maximum size of the unit. No matter how it is described, there would be five employees included in the unit who were members of the applicant on the application date. If the unit were to be described to include musicians and cleaners, Local 75 would have to have seven members in the unit to be eligible for a representation vote. Therefore, in the absence of Local 75's application under section 8, its application for certification would be dismissed. On the other hand, if the musicians are excluded, there would be nine employees in the unit and Local 75 could be certified without a representation vote under section 7.

9. The respondent denies that it has violated the Act. At the hearing into these matters, the respondent admitted it had reduced the hours of work of the four grievors but had done so without regard for the application for certification in order to reduce its costs in the face of a decline in revenue which had been a matter of concern for Branch 19's executive committee since July 1983 and a regular subject of discussion at its meetings.

10. The Board has heard the evidence of eight witnesses over four days of hearings. It has reviewed all of the evidence and the parties' representations thereon. Having considered their evidence and representations and the credibility of the witnesses, the Board has reached the following findings of facts and conclusions.

11. The Board's notice to the respondent's employees of the application was posted by the respondent on Friday, September 23, 1983. Beginning September 26th, 1983 and continuing, the respondent reduced by approximately half the scheduled hours of work of the four grievors. All but Rysinsky were part-time waitresses. Rysinski was working as a part-time waitress and part-time bartender. She continued to work as a part-time bartender for approximately the same number of hours as she had worked prior to September 26th, but she was no longer scheduled to work as a waitress. The change reduced her total weekly hours by slightly less than half. The respondent claims that its revenue from sales of alcoholic beverages was \$35,000 less in 1982 than in 1981 and its labour costs in 1982 had increased by \$10,000. While there has been no wage increases in 1983, its sales were continuing to decline. This testimony was entirely unsupported by specific evidence relating to the trend of respondent's sales and costs. Numerous times during his examination by both parties, Bogdan Piatkowski, President of Branch 19, answered that the Branch's accountant, a Mr. Zapior, would have information of one kind or another about the respondent's finances. Mr. Zapior was available to testify but was not called upon to do so by the respondent. In the circumstances, the Board is left without a satisfactory explanation from the respondent for its sudden decision to reduce the grievors' hours of work and the Board is prepared to infer from the respondent's failure to call Zapior that his evidence would not have assisted the respondent's defence.

12. Zapior was also the person who prepared and typed, ostensibly for one of the bartenders who testified in these matters, a petition which was filed in opposition to the application. The Registrar advised the parties in the Board's customary fashion that the petition bore the signatures of 10 persons who purported to be employees of the respondent. The form of the notice is such that no information is given which would reveal the identity of the persons. At the hearing, the Board advised the parties that there would be no need for the Board to inquire into the origin, preparation and circulation of the petition because it did not contain the signatures of any employees who previously had signed membership documents with Local 75. The Board, however, did hear evidence adduced by the parties with respect to the petition because of its relevance to the section 89 complaint and the request to apply section 8 of the Act.

13. The petition bears the date September 24th, 1983, the day after the respondent posted the Board's notice to the employees about the application. The bartender testified that Zapior had prepared it for him at his request on Sunday, September 25th, however. It was typed by Zapior on the respondent's premises. That same afternoon the Branch's executive committee held the meeting at which the decision was taken to reduce the number of hours of the grievors. It was the same day that the respondent's manager began to contact the grievors about the change in hours. The petition bears 10 typewritten names and addresses which were typed onto the petition before the signatures were obtained. Two copies were typed. One copy was sent to the Board. The bartender could not tell the Board what had happened to the second copy. He testified that he had met Zapior by chance outside the respondent's premises, and asked him for his help in writing a letter for the employees who did not want a union. It was his evidence that he told Zapior why the employees were opposed to a union and Zapior suggested the wording for the petition.

14. As a consequence of the respondent's failure to call Zapior to testify, the Board does not have his testimony of these circumstances surrounding the emergence of the petition. Once again the Board is prepared to draw the inference that his testimony would have been adverse to the respondent's interests. Having regard to the evidence of Zapior's involvement with the preparation of the petition, the failure of the respondent to call him to testify and the fact that the petition was prepared before signatures were solicited bearing the typewritten names and addresses of the respondent's employees exclusive of those who supported the application, the Board is prepared to draw the inference from all of the evidence that the respondent promoted the petition and at that time was fully aware of the identity of the employees who supported Local 75's application.

15. In a complaint alleging violation of section 66 of the Act, section 89(5) places upon the respondent the burden of proof that it did not act contrary to the Act. While an alleged violation of section 79 in many cases may not trigger that burden, in the instant case it is clearly part of the main thrust of the complaint that the grievors have been discriminated against because they have supported the application for certification. Thus the section 89(5) burden of proof applies also to the section 79 branch of this complaint. See the Board's decision in *Domtar Packaging*, [1982] OLRB Rep. July 993. The Board is satisfied on the evidence before it that the respondent was aware that the grievors had supported the application for certification. Furthermore, the Board is prepared to infer from the respondent's failure to explain to the Board's satisfaction its sudden decision to reduce the grievors' hours of work, the coincidence of that decision with the posting of the Board's notice and the respondent's failure to call its accountant to testify to the alleged financial need for the action and to his

role in the origin and preparation of the petition, that the respondent's actions were motivated at least in part by anti-union sentiments. For those reasons, the Board finds that the respondent has violated section 79(2) of the Act and, having regard for its underlying anti-union motive for the actions which were the cause of that violation, the Board finds further that the respondent has violated as well sub-sections (a) and (c) of section 66 of the Act.

16. Those breaches of the Act having been established, the first condition for application of section 8 has been met. In deciding whether the other two conditions have been met, it is useful to keep in sight the purpose of the section. That purpose is to repair the rights of employees and their trade unions in situations where their employer has breached the Act so flagrantly as to inhibit their right to freely choose whether they wish to be represented by a trade union. The purpose applies whether they are expressing their choice by means of the ballot in a representation vote or by the signing of membership cards. Section 8 also serves to prevent the respondent from benefitting from its breaches of the Act resulting in so few members being enlisted by the union's campaign that it cannot meet the threshold requirement for certification either with or without a representation vote under sections 7 or 9 of the Act. The Board has usually found that to have been the result where the employees' job security has been threatened by the employer's actions which violated the Act. In this respect, see the Board's decision in *Manor Cleaners Limited*, [1982] OLRB Rep. Dec. 1848 and the cases cited therein at paragraph 19.

17. While the instant case differs from *Manor Cleaners*, *supra*, in the specific nature of the employer's threat of the job security of the employees, there is no doubt that the respondent here also conveyed a very clear message to the grievors and to the other employees about job security: the price of exercising their freedom to choose to be represented by a trade union is a loss of wages. The four grievors working half the number of weekly hours they had previously enjoyed is an emphatic reminder to the other employees of the consequences of exercising their lawful choice in favour of trade union representation. This case is analogous to *Manor Cleaners*, *supra*, in terms of the timing of the employer's actions relative to the stage of the union's campaign. In that case the union's campaign, on a miscalculation by its organizers, had concluded when the employer acted to violate the Act. In the instant case, Local 75 had already made its application and filed its membership evidence when the respondent's violations took place. Local 75 obviously saw the bargaining unit to be only the bartenders, waiters and waitresses and, when it had adequate support, filed the application. As it turned out, it had approximately 62% support in that unit and slightly more than 55% if cleaners are included. As the Board commented in *Manor Cleaners*, it could be argued that the respondent's actions did not interfere with Local 75's campaign as it was already concluded. If that be so, however, as soon as the employer acted to violate the Act, it cut off Local 75 from any other courses of action to repair its circumstances. It would have had available to it the same courses of action as discussed in *Manor Cleaners*, *supra*. Even if its application had been dismissed for want of membership support, there would have been no bar to Local 75 using the same membership evidence to file a fresh application for a pre-hearing representation vote. The five cards would be sufficient to have a vote directed in a bargaining unit of 14 employees.

18. In all of these foregoing circumstances, the Board concludes that the true wishes of the employees would not likely be ascertained if Local 75 sought to increase its membership support by further campaigning or by applying for a representation vote. Further, the Board is of the opinion that Local 75 has adequate support for collective bargaining. The three

conditions for section 8 to be applied having been met, it remains for the Board to decide whether to exercise its discretion to certify the applicant.

19. The respondent, by its violations, has not only cut off Local 75 from alternative courses of action to repair its membership support, it has effectively foreclosed the Board from fashioning remedial action which would restore the climate which prevailed before the respondent's unlawful conduct. The respondent clearly knows where Local 75's membership support is and any change by any other employee in favour of Local 75 would be so apparent as to continue to jeopardize the freedom of employees to make a free choice with respect to Local 75. Therefore, the Board will exercise its discretion in favour of Local 75 and, since the Board has not finally resolved the composition of the bargaining unit, the Board relies on its discretion under sections 6(2) and 8 of the Act to certify Local 75 as the exclusive bargaining agent for all employees of the respondent in Thunder Bay, Ontario, save and except supervisors, persons above the rank of supervisor, sales and office staff and, pending final resolution of the bargaining unit, excluding as well musicians and cleaners.

20. The issuing of a certificate to the applicant must await the final resolution of the bargaining unit description which the Board is still considering.

21. With respect to the respondent's breaches of sections 66 and 79 of the *Labour Relations Act*, the Board orders that:

- (1) The respondent reinstate Jolanta Rysinski, June McKenzie, Helen Laprade and Mary Stefanowski into a work schedule which will provide them with gross earnings opportunities comparable to their work schedules prior to September 26, 1983, and to compensate them for the difference between the total weekly hours for which they were scheduled to work prior to September 26, 1983 and the actual hours which they worked after that date.
- (2) The respondent meet with a representative of Local 75 for the purpose of agreeing on how the order in item (1) above will be satisfied.
- (3) The respondent sign and post a notice in the form attached as "Appendix" in a conspicuous place on its premises in an area reserved for the use of employees or, in the alternative, in an area where employees have regular access during the course of their work shift; the notice to remain posted for sixty working days and the respondent to take all reasonable steps to ensure that the notice is not altered or defaced or covered by any other material; and, reasonable access to be given to a representative of the applicant in order that the applicant be satisfied that the posting requirement is being complied with.

22. The Board will remain seized of these matters should there be any dispute as to the implementation of this decision.

The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD, ISSUED AFTER A SERIES OF HEARINGS ARISING OUT OF THE EFFORTS OF THE HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES UNION, LOCAL 75 TO BECOME THE COLLECTIVE BARGAINING AGENT FOR OUR EMPLOYEES. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT BY INTERFERING WITH THE RIGHTS OF OUR EMPLOYEES TO SELECT A BARGAINING AGENT OF THEIR CHOICE.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A TRADE UNION;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY AND ALL OF THESE THINGS, IF THEY WISH.

WE ASSURE ALL OF OUR EMPLOYEES THAT:

WE WILL NOT DO ANYTHING TO INTERFERE WITH THESE LAWFUL RIGHTS THAT ALL EMPLOYEES ENJOY;

WE WILL NOT DISCRIMINATE AGAINST ANY EMPLOYEES FOR PARTICIPATING IN THE LAWFUL ACTIVITIES OF THE TRADE UNION, OR FOR ENGAGING IN FREE COLLECTIVE BARGAINING WITH US THROUGH LOCAL 75;

WE WILL REINSTATE JOLANTA RYSINSKI, JUNE MCKENZIE, HELEN LAPRADE AND MARY STEFANOWSKI INTO A WORK SCHEDULE WHICH WILL PROVIDE THEM WITH GROSS EARNINGS OPPORTUNITIES COMPARABLE TO THEIR WORK SCHEDULES PRIOR TO SEPTEMBER 26TH, 1983, AND COMPENSATE THEM FOR THE DIFFERENCE BETWEEN THE TOTAL WEEKLY HOURS FOR WHICH THEY WERE SCHEDULED TO WORK PRIOR TO SEPTEMBER 26TH, 1983 AND THE ACTUAL HOURS WHICH THEY WORKED AFTER THAT DATE;

WE WILL MEET WITH A REPRESENTATIVE OF LOCAL 75 FOR THE PURPOSE OF AGREEING ON HOW TO RESTORE THEM TO COMPARABLE HOURS OF WORK AND TO COMPENSATE THEM FOR THE DIFFERENCE IN HOURS WORKED AFTER SEPTEMBER 26TH, 1983 AND PRIOR TO THAT DATE; AND

WE WILL GIVE REASONABLE ACCESS TO A REPRESENTATIVE OF LOCAL 75 IN ORDER THAT IT CAN BE SATISFIED THAT THIS POSTING REQUIREMENT IS BEING COMPLIED WITH.

THE POLISH ALLIANCE FRIENDLY SOCIETY
OF CANADA BRANCH NO. 19, SOCIAL CLUB

PER: _____
PRESIDENT

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

1867-83-R Retail, Wholesale and Department Store Union, Local 414, Applicant, v. Queensway Foods Ltd., Respondent, v. Group of Employees, Objectors

Sale of a Business – Respondent seeking to expand its retail food business leasing premises of closed down Dominion store represented by applicant union – No equipment or inventory purchased and no Dominion employee hired – No sale but expansion of pre-existing business

BEFORE: R. D. Howe, Vice-Chairman, and Board Members F. C. Burnet and B. L. Armstrong.

APPEARANCES: *David I. Bloom and Robert McKay for the applicant; J. Paul Wearing and J. Virgona for the respondent; Bruno H. Kaufmann for the objectors.*

DECISION OF R. D. HOWE, VICE-CHAIRMAN, AND BOARD MEMBER F. C. BURNET; February 23, 1984

1. This is an application under section 63 of the *Labour Relations Act* in which the applicant trade union seeks a declaration that the respondent is bound by a collective agreement entered into by the applicant and Dominion Stores Limited (referred to in this decision as "Dominion"). The respondent and the objectors oppose the granting of any such declaration.

• • • •

3. Section 63 of the Act provides, in part, as follows:

63.-(1) In this section,

(a) "business" includes a part or parts thereof;

(b) "sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 14 or 53, sells his business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for

the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 14 or 53, as the case requires.

• • •

4. In *Calmil Enterprises*, [1980] OLRB Rep. Apr. 401, the Board described the scope and effect of section 63 (then section 55) as follows:

12. When a business (or a part thereof) is transferred or disposed of, the transferee acquires the business subject to the collective bargaining obligations of the transferor. Section 55 transforms these collective bargaining obligations into a form of “vested interest” which becomes rooted in the business entity and, like a charge of property, “runs with the business.” The statute eliminates the labour relations effects of a change of ownership or employer; and effectively abrogates the notion of privity of contract. The purpose of section 55 has been succinctly summarized by the Board in *Marvel Jewelry*, [1975] OLRB Rep. Sept. 733 at page 735:

“Section 55 recognizes that collective bargaining rights, once attained, should have some permanence. Rights created either by the Act, or under collective agreements, are not allowed to evaporate with a change of employer. To provide permanence, the obligations flowing from these rights are not confined to a particular employer, but become attached to a business. So long as the business continues to function, the obligations run with that business, regardless of any change of ownership.”

13. Section 55 involves two related questions, has there been a sale or transfer of “something” from the predecessor to the successor; and, if there has been, is it all, or part, of a “business” which has been transferred. The first question seldom poses any serious difficulties. The Act contains an extended definition of the term “sale”, and the Board has consistently held that the “manner of disposition”, or its legal form, are irrelevant, so long as a disposition has, in fact, taken place. More serious analytical problems arise with respect to the second question. There is no statutory definition for the term “business.” The Board has been left with the responsibility of fashioning an appropriate definition in particular cases, having regard to the business context, “the mischief” which section 55 was designed to cure, and the basic policies embodied in *The Labour Relations Act*. A general, and somewhat tentative definition, was suggested by the Board in *Raymond Cote*, [1968] OLRB Rep. Mar. 1211:

“The meaning to be attached to the word ‘business’ depends to a great extent on the facts and circumstances in each particular case.

It cannot be said that any one facet of an enterprise taken by itself necessarily comprises a business. It has been expressed that a business is 'the totality of the undertaking.' The physical assets of buildings, tools and equipment used in a business are not necessarily the undertaking *per se* but are, along with management and operating personnel and their skills, necessary in the operations to fulfill the obligations undertaken with a hope of producing profit to assume its success. The total of these things along with certain intangibles such as goodwill constitute a business.'"

14. A section 55 determination is largely a factual question. In *Raymond Cote, supra*, and a number of other cases, the Board has emphasized the importance of the facts: (see, for example: *Culverhouse Foods*, [1976] OLRB Rep. July 691 at 693; and also *Kenmir v. Frizzel*, [1968] 1 All E.R. 414 at 418, where a similar view was expressed by Widjery, J.) but it is impossible to abstract, from these cases, any *single* factor which is always decisive, or any *single* principle which provides an unequivocal guideline to the way in which the issue will be decided. What makes the problem especially difficult, is that the significance of any particular fact, or aspect of the transaction, may vary with the business context. This difficulty was noted by the Board in *Magnus Engineering and Construction Ltd.*, (Board Files 0486-79-R and 0491-79-R; decision released March 13, 1980 – as yet unreported.) At paragraph 26 the Board commented:

"The issue of employer successorship arises out of a seemingly endless variety of factual settings, with each new case presenting some of the factors considered relevant to the resolution of prior cases while raising other materially altered, entirely omitted, or newly-added facts which arguably should affect the decision of the merits. Much of the confusion which attends successorship results from the facility with which each case can be distinguished on its facts from all former cases; but to dismiss the confusion so lightly would be to disregard the fundamental differences inherent in the various business contexts in which the successorship issue arises. Factors which may be sufficient to support a 'sale of a business' finding in one sector of the economy may be insufficient in another. In some industries, a particular configuration of assets – physical plant machinery and equipment – may be of paramount importance; while in others it may be patents, 'know-how', technological expertise or managerial skills which will be significant. Some businesses will rely heavily on the goodwill associated with a particular location, company name, product name or logo; while for other business, these factors will be insignificant. *The Labour Relations Act* applies equally to primary resource industries, manufacturing, the retail and service sector, the construction industry and certain public services provided by municipalities and local authorities. In each of these sectors the nature of the business organization is different, yet in each case section 55 must

be applied in a manner which is sensitive to both the business context and the purpose which the section is intended to accomplish.”

An examination of the cases reveals certain themes, or factual patterns which, if present in the case under consideration, will strengthen the inference of a section 55 sale; but even these are only indicia. They are not conclusive tests. Even the significance of an apparent continuity of the predecessor’s business may be diminished if the assets involved in the transfer have a discrete and limited range of uses so that the transferee’s use will necessarily be the same as that of the transferor; or, if there are countervailing factors, such as a hiatus between the “demise” of the predecessor and the “birth” of the successor, or the interposition between the two of a truly independent third party. Such factors weaken the inference of a “section 55 sale” and suggest a transfer only of assets.

See also *Vaunclair Meats*, [1981] OLRB Rep. May 581, in which the Board wrote:

24. The Board has always recognized that the meaning to be attached to the word “business” depends to a great extent upon the facts and circumstances in each particular case. It cannot be said that any one facet of an enterprise taken by itself comprises the “business”. The business is the “totality of the undertaking”, including: the physical assets, tools and equipment, management and operating personnel, goodwill, and other intangibles. (See *Raymond Cote*, [1968] OLRB Rep. March 1211.) Thus, in determining whether it is the “business” which has been transferred, the Board has frequently found it useful to consider the extent to which these various elements of the predecessor’s business organization have been transferred into the hands of the alleged successor; that is, whether there has been an apparent “continuation of all, or part, of the business – albeit with a change in the nominal owner.” Many of these factors which the Board considers were summarized in *Culverhouse Foods Limited*, [1976] OLRB rep. Nov. 691 (application for judicial review dismissed):

“In each case the decisive question is whether or not there is a continuation of the business ... the factors which might assist the Board in its analysis; among other possibilities the presence or absence of the sale or actual transfer of goodwill, a logo or trademark, customer lists, accounts receivable, existing contracts, inventory, covenants not to compete, covenants to maintain a good name until closing or any other obligations to assist the successor in being able to effectively carry on the business may fruitfully be considered by the Board in deciding whether there is a continuation of the business. Additionally, the Board has found it helpful to look at whether or not a number of the same employees have continued to work for the successor and whether or not they are performing the same skills. The existence or non-existence of a hiatus in production as well as the service or lack of service of the customers of the predecessor have

also been given weight. No list of significant considerations, however, could ever be complete; the number of variables with potential relevance is endless. It is of utmost importance to emphasize, however, that none of these possible considerations enjoys an independent life of its own; none will necessarily decide the matter. Each carries significance only to the extent that it aids the Board in deciding whether the nature of the business after the transfer is the same as it was before, i.e. whether there has been a continuation of the business.

The issue before the Board, of course, remains whether there has been a "transfer of a business" or "part of a business", but it is much easier to make that finding, and to conclude that the collective bargaining relationship should be continued, if there is substantial continuity of the other elements of the predecessor's business organization. If the elements formerly used by "A" to carry on business are now in the hands of "B", and are used for the same business purposes, it is difficult to resist the conclusion that there has been some form of transfer "of a business" from "A" to "B". (See also: the remarks of Widgery J. in *Kewnmir v. Frizzel et al* [1968] 1 All ER 414 – a case arising out of legislation similar to section 55.)

5. The present case arises in the context of the retail food store sector of the economy. Over the years the Board has had occasion to consider a number of section 63 applications which have arisen in that context. The following passage from *More Grocerteria Limited*, [1980] OLRB Rep. Apr. 486, collects and reviews many of those decisions:

18. The retail food cases provide a classic illustration of the Board's attempt to ground the definition of business to the peculiarities of a particular industry and the policy of the statute in providing some measure of permanence to the collective bargaining process. One of the first cases is *Dutch Boy Foods Markets*, (1965), 65 CLLC ¶16,051. There the owner of certain premises in Kitchener leased the premises for fifteen (15) years to Carroll's Limited who carried on a grocery business at the location for two years. Carroll's in turn assigned its interest in the lease to Steinberg's Limited who thereafter carried the same type of business for approximately seven years. In 1964 Kitchener Food signed an offer to purchase all leasehold improvements and fixtures at the subject location conditional on the assignment of the lease between the original owners of the premises and Carroll's Limited. Steinberg's ceased operations December 24, 1964 and, after extensive alterations, Kitchener Food opened for business February 10, 1965. None of the former employees of Steinberg's were in the employ of Kitchener Food. In finding that Kitchener Food had purchased part of Steinberg's business the Board observed that had Kitchener Food only purchased the contents of the subject premises and moved them into other premises, it would have had no difficulty in finding the transaction was only the sale of assets. But the transaction, in fact, amounted to a disposition of Steinberg's entire operation in the Kitchener area. The Board also noted that the existence of a restrictive

covenant by Steinberg's would have conclusively established the sale of a business but the absence of such a covenant does not establish the contrary where the facts of the industry militate otherwise. It then went on to, in effect, find that the somewhat unusual features of the retail food supermarket gave a particular meaning to the terms "business" often coincident with a disposition or relinquishing of the physical premises. In this respect it wrote:

"A retail food supermarket, unlike some other businesses, has no customer orders or lists which can be transferred to a purchaser who intends to carry on the same type of business. By the very nature of a retail food business, with the exception of the name, a vendor has no goodwill which he can effectively give or withhold from a purchaser. The success of a food supermarket is dependent, on large measure, upon the support of the people who live in the area in which the store is located. Accordingly, any goodwill consists in the habit of customers of the vendor continuing to patronize the food market located in the same premises. If there was any goodwill to be acquired by Kitchener Food it was inherent in the premises themselves in which Steinberg's had carried on the same type of business as that carried on by Kitchener Food. Accordingly, the exemption of goodwill from the purchase price, in our opinion, has no real meaning.

Each food supermarket chain endeavours to attract customers on the particular quality of its merchandise. In this connection it features and advertises its own name brand products. Accordingly, it is to be expected that one chain food store would not be interested in acquiring the foodstuffs and inventory of another chain food store. This perhaps is particularly true in the instant case, since the evidence is that Steinberg's ceased its operations on the premises in question because it had not proved to be a sufficiently profitable operation to maintain. In our view, the failure of Kitchener Food to purchase the foodstuffs and inventory does not have any significant effect in our determination as to whether there was a sale of a 'business'.

With reference to the argument relating to the lapse of time before Kitchener Food opened its store, we are of the opinion that an analogy cannot be drawn between a retail food business and a manufacturing operation. In the latter case, if there was a shut down of the operation at the time of a sale to a purchaser who intends to carry on the same type of business, the result generally would be a production and financial loss to both the vendor and the purchaser. In the former case, however, it is generally necessary to shut down operations at the time of a sale in order to give the new owner an opportunity to make renovations which are in accord with its particular method of merchandising and carrying on business. It also allows time for the new owner to stock the premises with its own foodstuffs and inventory. In the instant case, Kitchener Food acted with all reasonable expedition in opening the premises for commercial operations

following its acquisition of the premises. In our opinion, the fact that there was a time lapse between the cessation of Steinberg's operations and the commencement of operations by Kitchener Food does not make the transaction any less the sale of a 'business'."

19. Cases confirming these views with similar positive findings of business sales are *Leader's Clover Farms Food Market* [1966] OLRB Rep. Nov. 636; *L & M Food Markets (Ontario) Limited* [1965] OLRB Rep. Sept. 440; *Super City Discount Foods Limited* [1970] OLRB Rep. April 118; *Gordon Markets* [1978] OLRB Rep. Dec. 1102. However, it is to be noted that *Super City*, *supra*, and the two *Gordons Markets* cases involved non-arm's length transactions where the Board had little difficulty in concluding that inter-corporate group transfers of business activity had occurred.

20. Cases in the retail food industry where the Board has dismissed section 55 applications include *Sunnybrook Food Markets* [1966] OLRB Rep. Oct. 53; *Sunnybrook Food Market (Keele) Limited* [1974] OLRB Rep. Jan. 47; *Zehrs Markets Limited* [1974] OLRB Rep. Apr. 311; *Dominion Stores Limited* [1979] OLRB Rep. 626; and *Darrigo Consolidated Holdings Inc.*, File No. 0266-79-R decision issued January 15, 1980. In the first *Sunnybrook* case Steinberg's operated stores in Ajax and Whitby prior to the assignment of its Whitby store lease to the respondent company. At about the time that Steinberg's closed the Whitby store it opened an Oshawa store and the Oshawa and Ajax stores were about five miles (distant) from the former Whitby location. In dismissing the application the Board appears to have been influenced by the fact that Steinberg's and Sunnybrook competed with each other by advertising in the community served by the other. Moreover, at the time Steinberg's closed its Whitby store and opened its Oshawa store, the move was prominently advertised at the Whitby store and customers urged to take their business to the Oshawa store. Focussing on these facts, the Board at paragraph 9 concluded:

"Having regard to all of the circumstances of the instant case, we conclude that this is not a case (such as the *Dutch Boy* case was) in which one employer goes out of business and another, purchasing all the substantial assets, opens for business at the same premises. Rather, this is a case in which an employer, changing the location of its business operations within a particular market area, disposes of certain unwanted premises and other assets to a competitor. In arriving at this conclusion, we have had regard, *inter alia*, to the fact that Steinberg's retained the services of certain of its employees, who were transferred from Whitby to Oshawa. This is consistent with the conclusion that Steinberg's has not disposed of its business in the market area in question. We would agree with the view expressed by the majority of the Board in the *Dutch Boy* case that the differences or similarities in employment forces as between "predecessor" and "successor" employers would not otherwise be relevant to the issue."

Counsel for the applicant submitted that in this case the Board failed to take into account that the definition of “business” includes the disposition of a part of a business and that the case was also incorrect if it stands for the proposition that a business cannot be sold to a competitor. He also submitted that the Board’s view of the relevant market area in this case was far too broad. He submitted that the relevant area for a “neighbourhood store” should be confined to the immediate vicinity of the store without cogent market evidence to the contrary. While each case must be decided on its own facts and the particular panel hearing the facts is in the best position to make the necessary judgments, we find counsel’s argument persuasive. We would decline to follow this case if it stands for the proposition counsel fears its supports. Clearly, an employer in this industry can dispose of a part of its business (and to a competitor) where it is prepared to gamble that a more remote store through widespread advertising can recapture all or part of that which it has ostensibly disposed of. Each of the parties to such a transaction is gambling with respect to the value of the disposition, but the facts of the case before this panel and our understanding of local patronage weighs against the conclusion of a mere asset disposition and lease assignment. Without evidence to the contrary, we accept counsel’s submission that the relevant market of a neighbourhood store should be narrowly defined and the particular facts in this case support this conclusion.

21. In the second *Sunnybrook* case the “A & P” had the benefit of a ten year lease on certain premises in Brampton together with three five year options for renewal. At the conclusion of the ten year term, “A & P” gave six month’s notice to the lessor that it would not be extending the lease. The evidence was that “A & P” had found the premises too small and outmoded; the profit was marginal; and it was negotiating for a replacement outlet in Brampton that was three times as large. “A & P” did not sell its fixtures to the respondent company until some six weeks before it ceased operations in the location fortifying the conclusion that there had been no direct or indirect transfer of the premises by “A & P” through the intermediary of the lessor. The relationship between the lessor and respondent company was therefore independent of “A & P” interests and its business decisions. Indeed, there had been no discussions about the lease between “A & P” and the respondent company and the sale of the fixtures was in no way conditional upon the successful completion of the lease transaction. The Board emphasized all of these factors in dismissing the application and disagreed with the general proposition that in the retail food business “the business adheres in the premises.” Counsel did not contend that the case was incorrectly decided. Indeed, it shows that there are circumstances where an employer may come to a conclusion that a location is no longer of value to him and unilaterally take steps to cease operations. In such circumstances, the resulting disposition of trade fixtures appears just as that....

22. *Zehrs Markets Limited* [1974] OLRB Rep. Apr. 331 is another example of a situation where the Board concluded that occupation of certain

physical premises involved the mere assignment of a lease. This case best illustrates the principle put forward by the applicant's counsel that the passage of time may so dissipate customer patronage that no ongoing business can be said to have been transferred. In that case, Busy B ceased operation in January of 1972 by virtue of an independent business decision regardless of the eventual disposition of the subject premises. Almost one year later Zehrs commenced operations. The hiatus of time weighed against the finding that Busy B had transferred a part of its business to Zehrs.

23. *Dominion Stores Limited* [1979] OLRB Rep. July 626 also demonstrates the Board's willingness to find against the sale of a business in appropriate circumstances. In that case Dominion stores operated a store in the immediate vicinity of the acquired premises and its occupation of the acquired premises (formerly occupied by Gordons) was accompanied by a closing of Dominion's original store in the area. This fact, together with a hiatus of five months convinced the Board that Dominion was simply moving its existing premises within the relevant market area and not acquiring the business of another. In doing so, Dominion achieved the elimination of a competitor through the benefit of a non-compete clause but there would appear to have been no evidence that Dominion's purpose was an increase in business by virtue of the operation of that provision. Indeed, the non-competition clause running with the lease appears to have been an incidental benefit in Dominion's independent dealings with the lessor. Had Dominion maintained its original store or if the principal purpose of the transaction had been to obtain the benefit of the non-competition clause, the result may well have been different....

24. Finally, in *Darrigo Consolidated Holdings Inc.*, (*supra*) the Board was satisfied that Dominion stores had facilitated the transfer of only a lease to Darrigo and not a business because of a hiatus in business activity of some fourteen (14) months

In the *More* case, the Board found that the respondent had purchased a part of Loblaws' business by subleasing from Loblaws certain premises in London at which Loblaws had operated a retail food store, and purchasing for \$14,000 certain "goods, chattels and effects" which had been used by Loblaws on the premises. More's purchase of those items was conditional on More obtaining the aforementioned sublease. In that case, Loblaws discontinued its operations on the premises on December 1, 1979 but thereafter (in order to provide for the local customers while the store was closed) provided free bus service from the premises to a new "super store", which it had opened two weeks earlier in a location five miles away, until December 19, 1979 when the respondent opened for business at the premises in question. The purchaser acknowledged that the premises constituted a "neighbourhood store" in that it relied on local clientele, and also acknowledged that on opening for business, the store was described as "formerly Loblaws" (or words to that effect) in advertisements. Although he owned another retail food store in Stratford, the store in question was Mr. More's sole retail food store in the London area.

6. With those general principles in mind, we will now turn our attention to the facts

of the present case. This application pertains to a retail food store at 3671 Dundas Street West, Toronto. Dominion operated a retail food store at that location, originally as a "Dominion Store" and later (from sometime in 1980 until March 26, 1983) as a "Thrift" food store. During its final full financial quarter (December 19, 1982 to March 19, 1983) under the latter name, the store's average weekly sales were \$54,000, with an average of 3,500 customer transactions per week. During that period the store employed approximately nine or ten full-time employees, and four or five part-time employees. Through its "Thrift" operation at that location, Dominion offered customers a very limited grocery line, basic meats, and a relatively small range of produce in a "warehouse type store" at which customers bagged their own purchases at the cashiers' counters. It appears that all the Thrift stores have now been closed as part of a change in Dominion's marketing concepts.

7. The applicant has held bargaining rights for a number of years for Dominion employees (including employees at Dominion's "Thrift" stores) in various Ontario municipalities, including Metropolitan Toronto. Its most recent collective agreement with Dominion became effective on October 17, 1982 and will remain in effect until June 21, 1984. It is that agreement which the applicant contends is binding upon the respondent by virtue of section 63(2) of the *Labour Relations Act*.

8. The respondent operates four retail food stores (including the store involved in this application) in Metropolitan Toronto under the name "Bonanza Supermarkets". It also purchases and warehouses food for those four Bonanza outlets. The respondent has operated in Metropolitan Toronto since May of 1981. Its president, Joseph Virgona, has over twenty years' experience in the food industry. In his candid and credible testimony before the Board, Mr. Virgona described the respondent's business as "retail food with emphasis in the ethnic communities". In order to attract customers from various ethnic communities in Metropolitan Toronto, and in particular from Metro's Italian community, the respondent offers in its four full-service supermarkets a "high range of ethnic lines". For example, in its meat departments, the respondent concentrates on veal, sausages, rabbit, fresh quail, goat meat, lamb, and other types (and cuts) of meat not generally sold by retail chain stores. Similarly wide varieties of ethnic foods are offered in its grocery and produce departments. Much of the respondent's \$450,000 annual advertising budget is concentrated on commercials aired during Italian programmes broadcast by multicultural radio and television stations in the Metropolitan Toronto area.

9. During late 1982 or early 1983, the respondent began to look for a location in the "Jane - St. Clair area, north of St. Clair", with a view to expanding its business by opening another retail outlet. That area was selected by reason of its high ethnic concentration. The respondent was assisted in its search by F. G. Young Real Estate Limited. In January of 1983, Mr. Virgona visited a number of retail food stores in the respondent's "target area" and in surrounding areas. One of the stores that he entered and observed at that time was the aforementioned Thrift store at 3671 Dundas Street West. As a result of observing those retail food stores, Mr. Virgona concluded that the stores operated by Dominion, Safeway, and Miracle Mart in that vicinity were not catering to the ethnic communities. When he visited the store in question in January of 1983, Mr. Virgona was unaware that the store would subsequently be closed by Dominion and thereby become available for rental.

10. As indicated earlier in this decision, Dominion closed its Thrift store at 3671 Dundas Street West on March 26, 1983. In April of that year, Mr. Virgona learned of the closing

through conversations with various food salesmen who call upon him regarding purchases of merchandise by the respondent. Since no suitable location in the "target area" north of St. Clair Avenue had been found, Mr. Virgona instructed F. G. Young Real Estate Limited in May of 1983 to approach Dominion and attempt to negotiate a suitable lease of the 3671 Dundas Street West premises. Negotiations commenced near the end of May and concluded on or about June 28, 1983 with the execution by the respondent and Dominion's property company (DSL Properties Limited) of an offer to lease. (The respondent subsequently executed a formal lease on December 5, 1983, which had not yet been executed by DSL Properties Limited as of February 7, 1984, the date of the Board's hearing of this application.) In addition to a specified annual minimum rent, the leasing arrangements between the respondent and Dominion provide for an additional "percentage rent" calculated as a percentage of revenue from sales. The lease also restricts the respondent to using the leased premises "only for the purpose of a food supermarket, as carried on by the [respondent] in the majority of its other stores in the Municipality of Metropolitan Toronto".

11. After allowing Dominion approximately four or five weeks to remove all remaining equipment and other chattels, the respondent took possession of the premises around the beginning of August. All that was left behind by Dominion were two built-in wooden coolers which were impractical to remove. The respondent purchased no equipment, inventory, or other chattels from Dominion. After taking possession of the premises, the respondent spent over \$95,000 on leasehold improvements, and over \$500,000 to equip the store. Instead of the deep warehouse racks used in the Thrift store, the respondent used normal retail food store shelving to display its grocery merchandise. In contrast to the approximately 1,600 grocery lines offered by Thrift at that location, the respondent offered over 6,000. Comparable expansions of merchandise, with emphasis on ethnic foodstuffs, were also effected in the produce and meat departments.

12. The respondent opened its store at the location in question on October 19, 1983. During its first week of operation, the store had almost 10,000 customer transactions totalling over \$290,000 in sales. In the period from October 22, 1983 to the end of January of 1984, the store's weekly sales averaged about \$183,000, with an average of approximately 8,000 customer transactions per week. Although some of its customers come from a nearby subdivision, others travel a considerable distance to shop there. Having regard to the totality of the evidence, the Board is of the view that the store, as operated by the respondent, cannot accurately be described as a "neighbourhood store" as that term is generally understood in the Board's jurisprudence.

13. There is no evidence that any of the individuals employed by Dominion at the Thrift store as bargaining unit employees or members of management have become employees of the respondent. The Manager of the store in question has been employed by the respondent for about eight years, and was transferred to that store from one of the respondent's other retail outlets. The respondent employs a total workforce of about 68 persons at the store, 36 of whom are full-time employees, and the remainder of whom are part-time employees. The respondent does not receive any supplies from Dominion, nor does it have any corporate, financial, or other connections with Dominion apart from the leasing arrangement described above. Dominion remains a competitor of the respondent and operates two of its own stores within four or five kilometres of the store in question.

14. Section 63(5) of the Act empowers the Board in certain circumstances to terminate

a union's bargaining rights if, in the opinion of the Board, the person to whom the business was sold has changed its character so that it is substantially different from the business of the predecessor employer. However, none of the parties to this application contended that subsection (5) was applicable in the present circumstances, and the evidence would not in any event support a finding of a substantial change in the character of the business. Thus, section 63(5) provides no assistance in deciding the present case.

15. While the Board's jurisprudence referred to earlier in this decision is helpful in a general sense, each case under section 63 of the Act must ultimately turn on its own individual facts. In this case, some of the facts, when considered in the context of the retail food industry, do tend to point toward a sale of a business within the meaning of section 63. The respondent leased from Dominion premises at 3671 Dundas Street West which had for many years been used as a retail food store by Dominion. The terms of the leasing arrangement restrict the respondent to using the leased premises "only for the purpose of a food supermarket". Although Dominion remains a competitor of the respondent in the Metropolitan Toronto area, its two nearest stores are four or five kilometres away, and it is reasonable to infer that at least some of the former customers of the Thrift store now shop at the store which the respondent is operating on those premises. However, a number of other facts militate against finding a sale of a business by Dominion to the respondent in the circumstances of the present case. The Thrift store was closed by Dominion on March 26, 1983 as part of a change in Dominion's marketing concepts. At no time prior to the closing was there any suggestion that the respondent might be interested in operating a food store at that location. Indeed, the respondent, which already operated three ethnically oriented supermarkets in Metropolitan Toronto, did not even become aware of that closing until some time in April, and it was not until May that the respondent, having been unable to locate suitable premises in its "target area" north of St. Clair Avenue, instructed its real estate agent to approach Dominion about the possibility of leasing the premises. Negotiations between Dominion and the respondent (through its independent real estate agent) commenced near the end of May and did not conclude until June 28, 1983. There followed a four or five week period during which Dominion removed all of its remaining equipment and chattels, with the exception of two built-in wooden coolers which it was impractical to remove from the premises. After taking possession of the vacant premises around the beginning of August, the respondent spent approximately two and a half months (and approximately \$600,000) improving the premises and re-equipping the store. When the respondent's new store opened on October 19, 1983, it drew customers from a wide area, including its ethnic "target area", and enjoyed a sales volume many times greater than that of the Thrift store which had earlier been operated by Dominion at that location. The respondent did not acquire any managerial or other expertise from Dominion, and it is clear from the evidence as a whole that the respondent's success at that location has been built upon its own entrepreneurial activities, and not upon any measure of "goodwill" derived from the fact that Dominion had operated a retail food store at that location six and a half months earlier. Thus, on balance, we find that the respondent's business at 3671 Dundas Street West is not a continuum of the business formerly operated by Dominion at that location, but rather is an expansion of the respondent's own pre-existing parallel retail food store business.

16. Therefore, having regard to all of the evidence and the submissions of the parties, the Board finds that although the respondent leased the premises in question from Dominion, that transaction did not constitute a sale of a business by Dominion to the respondent within the meaning of section 63 of the *Labour Relations Act*.

17. For the foregoing reasons, this application is hereby dismissed.

DECISION OF BOARD MEMBER B. L. ARMSTRONG;

1. I regret that I cannot agree with the decision of the majority. In my view the execution of a lease by the respondent to operate a retail food outlet formerly operated by Dominion as a Thrift Store at 3671 Dundas Street West, Toronto, constitutes a "sale of business" within the meaning of section 63 of the *Labour Relations Act*.

2. The facts are not in dispute. Dominion operated a retail food store at that location, originally as a "Dominion Store" and later (until March 26, 1983) as a Thrift Food Store. It appears that all the Thrift Stores have now been closed as Dominion changes its marketing concept.

3. The applicant has held bargaining rights for a number of years for the employees at Dominion and employees at Dominion Thrift Stores. The most recent collective agreement remains effective until June 21, 1984, and I support the applicant's position that this agreement is binding and effective upon the respondent by virtue of section 63(2) of the *Labour Relations Act*.

4. Joseph Virgona, the president of the respondent, in his testimony described the business as "retail food with emphasis in the ethnic communities", offering over 6,000 lines compared to Thrift Store's 1,600 grocery lines at that location. Although some of the customers come from the nearby neighbourhood, my colleagues conclude that the store, as operated by the respondent, cannot accurately be described as a "neighbourhood store". I take the opposite view. We are unanimous, however, in finding that the increase in lines offered and the variety geared to the ethnic community does not change the nature of the business; it was and still is a food store. Dominion operated a food store for a number of years and three years ago converted to a Thrift Store, a new marketing concept in a food store. Mr. Virgona visited the store in January of 1983 and later learned the store was closed and available for rent. An offer to lease was executed in June of 1983. The respondent reopened the store in October of 1983 with increased weekly sales and the introduction of retail food store shelving to display the grocery merchandise. A formal lease was executed on December 5, 1983, restricting the respondent to using the leased premises "only for the purpose of a food supermarket" with provision for an annual minimum rent and an additional "percentage rent" calculated as a percentage of revenue from sales.

5. It is my position that the changes in merchandise and marketing are not critical, and that the entire transaction must be looked at. The respondent acquired premises that had been used by Dominion as a food store, for the purpose of operating a food store at that lo-

cation. Indeed, its lease prevents it from using the premises for any other purpose. That restriction, together with the fact that the location of a food store is a vital element in the retail food business, leads me to conclude that a sale of a business did take place, and I would so find.

2150-83-R Ontario Public Service Employees Union, Applicant, v. Board of Governors of Ryerson Polytechnical Institute, Respondent, v. Group of Employees, Objectors

Bargaining Unit – Practice and Procedure – Employer seeking separate units for career and non-career employees performing same work – Two groups having substantially different terms and conditions of employment – Not causing Board to depart from policy of not carving out units based on permanent or temporary nature of employment relationship – Board not separating part of department – Not excluding employees on special projects – Review of considerations in determining appropriateness of bargaining units

BEFORE: Richard M. Brown, Vice-Chairman, and Board Members F. W. Murray and W. F. Rutherford.

APPEARANCES: *Chris Paliare and Barbara Linds for the applicant; Michael Gordon and John Rolian for the respondent; Michael G. Horan and Penny Lee for the objectors.*

DECISION OF THE BOARD; February 21, 1984

1. This is an application for certification.

• • • •

I

4. OPSEU sought to be certified for a single bargaining unit comprised of employees engaged in office, clerical and technical work and in the food services department at Ryerson Polytechnical Institute ("Ryerson"). Ryerson contended that these employees should be divided into three bargaining units: (1) all career employees; (2) all non-career employees, except those working in the food services department; and (3) non-career employees in the food services department. Excluded from any of the three units proposed by Ryerson are employees engaged on projects financed by funds separate from the regular operating budget. This category includes approximately twenty people. The parties are agreed that whether there be one unit or three, students and part-time employees are to be excluded.

5. Just over a year ago, Ryerson voluntarily recognized the Ryerson Staff Association as bargaining agent for some of the employees affected by this application – all career employees and some non-career employees. This collective bargaining relationship has not yet produced a first agreement.

6. There are four other bargaining units in existence at Ryerson. All faculty members employed in the regular day-time program are organized: "tenure-track" faculty members are represented by the Ryerson Faculty Association and their "non-tenure track" colleagues – both full-time and part-time – are represented by the Canadian Union of Educational Workers. Night course instructors, who work part-time, are excluded from both of these units and are without a bargaining agent. Markers, demonstrators and tutors, who are also part-time employees, are similarly unrepresented. Typesetting employees fall under the jurisdiction of the Toronto Typographical Union. Maintenance and care taking staff are represented by Local 233 of the Canadian Union of Public Employees.

7. The distinction between career and non-career staff has been reflected in Ryerson's personnel policies for the past nine years. These two groups are *not* differentiated by the work they perform; a career secretary may work alongside a non-career secretary doing the same tasks. The only difference between them lies in their terms and conditions of employment. Career employees are told by Ryerson when hired that they will have a job for as long as they perform satisfactorily and Ryerson continues to exist in substantially its present form. Redundancies within this group rarely occur. An employee whose job becomes obsolete is typically transferred to another job, perhaps after retraining. A person who is terminated through redundancy is entitled to a severance payment in the amount of two weeks pay for every year of employment. Career employees are paid according to an established salary scale derived through a system of job analysis. The fringe benefits they receive include OHIP coverage, disability insurance, life insurance, and a pension. With minor exception, all vacancies in career positions are advertised, and the qualifications and seniority of all applicants for a vacant position are considered before an appointment is made. Only service as a career employee is recognized for the purpose of calculating seniority for this purpose.

8. Non-career employees are hired to do a particular job for a predetermined period ranging up to a maximum of one year. They are told not to expect continued employment beyond this time, but are assured they will be considered for any subsequent job that might become available. A non-career employee often works for more than a year, under a series or two or more short-term contracts. There is no established salary scale for non-career employees; the amount they are paid is largely determined by current labour market conditions. Some are on salary and some are paid on an hourly basis. Aside from OHIP benefits provided to some non-career employees, there are no fringe benefits for this group. All of the non-career employees in the food services department and two thirds of those working elsewhere are employed only during the academic term.

9. At the time the application was made, during the Christmas break, there were 382 career employees and 185 non-career employees. However, the number of non-career employees working during the school term is substantially higher. According to Mr. Rolian, who is in charge of personnel matters at Ryerson, the reason for distinguishing between these two groups is to create a core of experienced staff upon whom the Institute can rely to provide its basic manpower needs. He conceded that there were also budgetary advantages to this personnel policy.

10. Mr. Rolian testified that the large differences between the terms and conditions of employment of these two groups of employees has been the single largest barrier standing in the way of a collective agreement between Ryerson and the Ryerson Staff Association. That bargaining agent currently represents career employees and non-career employees hired for a

term of at least four months. Throughout the course of negotiations, these non-career employees have sought to achieve the benefits now enjoyed by their career counterparts. But career employees have recognized that their privileged status is threatened by this call for equal treatment. Therein lie the seeds of internal discord. However, Mr. Rolian also volunteered that negotiations were impeded by a lack of experience on the part of Ryerson Staff Association representatives and by a change in the Association's leadership.

11. At the time of the hearing, the food services department was made up of forty non-career employees doing manual work and seven career employees in positions such as supervisor, chef and food technologist. All non-career employees in this department are paid on an hourly basis, at a rate of pay different than other non-career employees. As food services is a small department, there is little chance of advancement for any employee. Mr. Rolian testified that this department is self-funding in the sense that all costs, except the expense of employing career staff, are paid out of cafeteria revenues.

12. Some of the work carried on at Ryerson is funded by special grants from government bodies, cooperation on other similar sources. In some cases, the funds are impressed with a direction from the donor as to how much may be spent for salaries and wages. The only grants in evidence which dictate who may be employed apply only to students and so need not be considered.

II

13. The concept of a bargaining unit performs two quite distinct functions in labour relations law. In order to be certified, a trade union must enjoy the support of a majority of employees in a bargaining unit. The unit serves as an electoral district in this setting. After a union is certified, the bargaining unit found by the Board to be appropriate strongly influences the conduct of collective bargaining. Although the parties sometimes vary this unit description, it is frequently simply reproduced in the recognition clause in a collective agreement.

14. A trade union may experience insurmountable difficulties in trying to organize employees in a unit that is broadly defined to embrace employees who are geographically dispersed or perform substantially different jobs. As one of the fundamental objectives of the *Labour Relations Act* is to assist employees to join together for collective bargaining, this Board has been reluctant to establish units which are so broadly based that they defy organization. See *Ponderosa Steak House*, [1975] OLRB Rep. Jan. 7. The public policy of facilitating organization is a two-edged sword. A trade union may propose a unit defined so as to leave unrepresented a group so small that they have no real chance of entering the world of collective bargaining alone. In these circumstances, the Board expands the proposed unit to include the employees in question, even though the result may be to dilute support for the union to the point that the application is dismissed. See *Board of Education for the City of North York*, [1982] OLRB Rep. June 918 at paragraph 7.

15. Organizational concerns are not the only forces that shape bargaining units. The Board must also strive to create a viable structure for ongoing collective bargaining. See *Usarco Limited*, [1967] OLRB Rep. Sept. 526; *K Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250; and *Insurance Corporation of British Columbia*, [1974] 1 CLRBR 403 (B.C.). From this perspective, a broadly based bargaining unit offers several advantages over a fragmented structure.

16. A proliferation of bargaining units increases the risk of unnecessary work stoppages. The likelihood of a strike occurring grows with the number of rounds of negotiations and may be further increased by competitive bargaining between two trade unions. The potential for mischief is greatest when the work performed in two or more units is integrated. In these circumstances, whenever one group strikes, other employees who are functionally dependent upon struck work are deprived of employment, though they may stand to gain nothing from the strike because their agreement has just been renewed. Even in the absence of functional integration, strikers may erect picket lines that keep other employees away from work, although a concerted refusal to cross a picket line, by employees who are not entitled to strike, is an illegal work stoppage.

17. There are other drawbacks to a multiplicity of bargaining units. Each unit is likely to become an enclave surrounded by legal barriers – designed to enhance the job opportunities of employees within the walls – that impede the mobility of employees. Restrictions on mobility may entail significant costs for an employer whose practice is to frequently transfer employees between jobs that fall in different units. In some cases, these barriers may close natural lines of job progression to the detriment of all concerned. A fragmented bargaining structure also inevitable spawns jurisdictional contests over the allocation of work among units, disputes which in the long run benefit no one. And a proliferation of bargaining units entails the time and trouble of negotiating and administering several collective agreements. From the perspective of an employer with centralized control over labour relations, there is an unnecessary duplication of effort. All of these concerns – work stoppages, restricted employee mobility, jurisdictional disputes and administrative costs – favour consolidated bargaining structures, although the force of each vector varies from case to case.

18. But the community of interest among employees may point towards either a broadly based structure or separate bargaining units. In this context, the word interest, in the phrase community of interest, refers to the bargaining objectives of the employees in question. The most important determinate of those objectives is the work performed. Skills and terms and conditions of employment are also relevant, but these factors are largely derived from the nature of work. In deciding whether to include a population of employees in one bargaining unit or to divide them into separate units, the Board has recognized that within a single unit there is a tendency to compress existing differentials in wages, benefits and other work rules. People who perform the same, or substantially similar, work are likely to have similar aspirations concerning terms and conditions of employment. And a strong argument can be made that they ought to be treated in the same way. Equal treatment is fostered by including all such employees in one bargaining unit. Conversely, employees whose jobs differ radically from the work of their fellow employees have a legitimate claim to different terms and conditions of employment. If they are pressed into one large unit, the logic of collective bargaining is bound to erode existing differentials. Those on the short end of the stick not only have a compelling grievance but also may cause disruption. And an employer may experience difficulty in recruiting for jobs in which the terms and conditions of employment are less attractive than elsewhere. Separate bargaining units may alleviate these problems. However, not all differences between jobs are this fundamental. As a single collective agreement permits of some variation in terms and conditions of employment, it can embrace employees whose jobs differ to some degree, without generating undue dissatisfaction. When entertaining an application by a special interest group for a separate bargaining unit, the Board must also bear in mind that these employees would not achieve complete autonomy by winning a separate unit, because it could not be insulated from the forces of pattern bargaining exerted by neighbouring

units. The challenge is to decide what differences between jobs are of sufficient magnitude to justify the creation of separate bargaining units, with their attendant disadvantages. In other words, a balance must be struck between the competing considerations that bear upon the creation of a viable bargaining structure.

19. The design of bargaining units becomes even more complex when the focus of attention is expanded to include not only ongoing collective bargaining but also organizational concerns. The optimal unit for long-term bargaining may be larger than the grouping within which a trade union can be reasonably expected to obtain the level of employee support necessary for certification in the short-run. In other words, there is an inherent stress lurking within the concept of an appropriate bargaining unit because it performs two very distinct functions. How has the Board responded to this industrial relations conundrum? The decision in *K Mart Canada Limited, supra*, at paragraphs 18 to 20, provides an apt illustration. The employer operated four stores in one municipality, the union had organized one at which 127 employees worked, and a certificate was granted for this unit. A broader-based structure was rejected, because it might significantly impede access to collective bargaining. However, the Board suggested it would have been “hard pressed” not to certify a municipal unit if the union had organized all four stores, suggesting a consolidated structure would lead to more effective collective bargaining than several smaller units. In other words, the viability of ongoing collective bargaining was compromised to this extent in order to foster self-determination. But the Board declared that self-determination would not always come out on top. One example used to make this point involved an employer operating fast food outlets at several locations in a municipality and employing at each a substantially smaller number of employees than worked at one K Mart store. The Board strongly hinted that an application for a bargaining unit comprised of one outlet would be rejected.

20. The creation of a viable bargaining structure is the only objective when employees have ready access to collective bargaining whatever the unit configuration – i.e. when a single large unit will not unduly impede organization. The Board has often been called upon to reconcile the claims of special interest groups with the considerations that favour a consolidated bargaining structure. There is a long-standing practice of segregating plant and office employees in separate units in recognition of their divergent interests. See *H Gray Limited*, 55 CLLC ¶18,011. But bargaining units consisting of employees in one particular classification or department are not generally considered by the Board to be appropriate because such small units entail excessive fragmentation. See *Corp. of the City of Barrie*, [1974] OLRB Rep. Nov. 813. And in *Stratford General Hospital*, [1976] OLRB Rep. Sept. 459, paramedical personnel were included in the same hospital unit as professional staff. In that case, the Board said:

Rational solutions lie in the careful examination of evidence for significant differences in community of interest between occupational groupings bearing in mind the structural requirements for effective collective bargaining and labour relations. At the risk of being repetitive we think it important to observe that it is natural for certain groups of employees to be apprehensive about the outcome of collective bargaining if their occupation does not dominate a bargaining unit in sheer numbers and seldom is the Board confronted with applications for certification affecting employees with identical interests, abilities and backgrounds. Thus, if the Board was to be preoccupied with these apprehensions an unmanageable proliferation of potentially ineffective bargaining units would be the likely

result. Accordingly, the Board must concern itself with only significant differences between employee interests and these significant differences must result in practical bargaining unit demarcations – practical in the sense that demarcations must provide efficient answers to like cases; there must be reasonable assurance that they can withstand the passage of time; and practical in the sense that sound collective bargaining relationships can be built upon them.

21. Can the interests of employees who perform the same work, but on different temporal basis, diverge sufficiently to require the certification of separate units? Full-time and part-time employees, who often perform the same tasks, are always separated because they do not share a community of interest. As was said in *Toronto Airport Hilton*, [1980] OLRB Rep. Sept. 1330, at paragraph 6:

This practice reflects the Board's view, supported by the extensive labour relations experience and knowledge of its members, that part-time employees and students, on the one hand, do not generally share a community of interest since the former are primarily concerned with maintaining a convenient work schedule which permits them to accommodate the other important aspects of their lives with their work and with obtaining short-term immediate improvements in remuneration rather than with obtaining life insurance, pension, disability, and other benefit plans; extensive seniority clauses; and other long-term benefits.

22. But the Board has consistently refused to segregate permanent employees from those employed on a casual or temporary basis. *Sydenham Hospital*, [1967] OLRB Rep. May 135; *Centre Gray General Hospital*, [1968] OLRB Rep. Mar 1172; *United Counties of Northumberland Durham*, [1968] OLRB Rep. Dec. 915; *Oshawa General Hospital*, [1970] OLRB Rep. Jan. 1218; *Chapples Stores Ltd.*, [1970] OLRB Rep. June 313; *Board of Education of Borough of Scarborough*, [1975] OLRB Rep. Sept. 657; *Spramotor Ltd.*, [1976] OLRB Rep. 215; *Board of Education of Borough of Scarborough*, [1980] OLRB Rep. Dec. 1713; and *Board of Education for the City of Toronto*, [1983] OLRB Rep. Feb. 273. (Only seasonal employees in the canning and tobacco industry have been excepted from this rule. See *Melner Manufacturing Ltd.*, [1969] OLRB Rep. Mar. 1288.) This has been the Board's policy even though the interests of these two groups of employees sometimes diverge. Consider two full-time employees, one hired for an indefinite term and the other engaged occasionally over a period of few months. The temporary/full-time employee is likely to want terms and conditions of employment different than the permanent/full-time employee for much the same reasons as a part-time worker does. But some limit must be placed upon the number of bargaining units in order to avoid undue fragmentation. Another reason for not creating yet another unit for temporary employees is that one cannot always forecast whether an employee's term of employment will turn out to be temporary or permanent. An employee is often hired with a promise of work for a fixed term coupled with the possibility of continuing to work thereafter. In this setting, a person's bargaining objectives change slowly over time as he or she begins to perceive a permanent nexus with the employment relationship. Consequently, there is no neat division between employees who see themselves as temporary and those whose self-perception has a permanent hue.

23. We know of no case in which the Board has established separate units for two categories of previously unorganized employees who perform the same work, over the same time frame, and are distinguished only by their terms and conditions of employment – one group having received preferred treatment in the past. In these circumstances, the legitimate aspirations of all employees are the same. And as was noted in *Board of Education of the Borough of Scarborough*, [1980] OLRB Rep. Dec. 1713, at paragraph 13, these aspirations – not the terms and conditions of employment unilaterally promulgated by management – are what establishes a community of interest. Nor is the source of funds from which employees are paid relevant to community of interest.

III

24. In the case at hand, the union has organized a sufficient number of the employees in question to be entitled at least to a vote, and perhaps to outright certification, whatever the unit configuration. Indeed, OPSEU has asked us to define one large bargaining unit. Consequently, our only concern is the viability of the structure we create for ongoing collective bargaining.

25. We were asked by Ryerson to segregate non-career employees from career employees. The two groups generally perform the same work. In addition, many of the non-career employees, whose contracts have already been renewed on one or more occasions, have a relationship with Ryerson which has spanned several years. And there are others who reasonably expect a relationship of similar duration to unfold in the future. For want of a better description, we will apply the label long-term/non-career to these employees. Terms and conditions of employment aside, long-term/non-career workers are little different than career employees – even though most of the non-career employees work only during the academic term. The best evidence of a community of interest between these two groups is the past efforts of long-term/non-career employees to win the benefits, promotional opportunities, and job security enjoyed by their career colleagues. That is not to say that all non-career employees have a strong community of interest with career workers. Someone who is employed for a very short time with no possibility of extension does not. But this person has no greater community of interest with long-term/non-career employees. Any attempt to divide non-career employees according to their bargaining objectives is likely to be frustrated by changes in an employee's aspirations caused by the emergence of a perception of a long-term relationship. In any event, we were not asked to draw such a line. Ryerson seeks to exclude all non-career employees from a career employee unit. This division does not coincide with any watershed that divides these employees according to their employment aspirations. And the proposed dividing line would lead to further fragmentation of a work force already split among four bargaining units. In these circumstances, the difference in terms and conditions of employment offered to career and non-career employees in the past is not a sufficient reason to place these groups in separate units.

26. In accordance with the Board's practice of not creating a separate unit for a department, we would not find the food services department to be an appropriate bargaining unit. Ryerson proposed a unit comprised not of all kitchen employees but of only those with non-career status. There is even greater reason not to hive off part of a department. By suggesting that career employees in all departments be grouped together, the employer recognized that career employees in the kitchen have a community of interest with career workers elsewhere in the institution. For the reasons set out in the preceding paragraph, we believe this

community of interest is also shared by long-term/non-career employees in the food services department. This consideration, coupled with our aversion to fragmentation, leads us to conclude that a unit of non-career employees in the kitchen is not appropriate for collective bargaining.

27. We were asked to exclude employees engaged on special projects – projects financed by funds separate from the regular operating budget – from whatever unit(s) we found to be appropriate. As noted above, the source from which employees are paid has no bearing on their community of interest. Given the small size of this group and the limited duration of many projects, excluding these employees would seriously impair their opportunity to engage in collective bargaining. Barring these employees from bargaining collectively is precisely the employer's objective. The rationale advanced in support of this goal is that special grants received by Ryerson often carry a direction from the donor as to how much of the grant may be spent on salaries and wages. There is no evidence that the terms of any such grants preclude Ryerson from supplementing the salary portion with its own funds, although fiscal restraint may preclude this. But these employees are entitled, by the *Labour Relations Act*, to bargain collectively with their employer.

28. In short, we believe all of the employees embraced by this application ought to be included in a single unit. We await the assistance of the parties in formulating a precise description of that unit.

0040-83-JD The Mechanical Contractors Association of Ontario and **Scope Mechanical Contracting Limited**, Complainants, v. The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and its Local Union 527; Labourers International Union of North America and its Local Union 1081, and Lou Leclaire Contracting Ltd., Respondents

Jurisdictional Dispute – General contractor sub-letting work to sub-contractor – Grievance against sub-contractor demanding union members be hired triggering work assignment dispute under s.91 – Fact that demand based on false premise of related employer irrelevant

BEFORE: Ian C. Springate, Vice-Chairman, and Board Members J. Wilson and W. F. Rutherford.

APPEARANCES: *S. C. Bernardo and B. West for the complainants; S. Simpson, J. Porter and T. Crystal for the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada and its Local Union 527; B. Fishbein, T. Connolly and K. Rimmington for Labourers International Union of North America and its Local Union 1081; M. Horan and L. Leclaire for Lou Leclaire Contracting Ltd.*

DECISION OF THE BOARD; February 1, 1984

1. This is a complaint under section 91 of the *Labour Relations Act* with respect to the assignment of certain work.
2. For ease of reference, the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, its Local 527 and the Ontario Pipe Trades Council will hereforth be referred to simply as the "U.A." Labourers International Union of North America and its Local 1081 will be referred to as the "Labourers Union". Scope Mechanical Contracting Ltd will be referred to as "Scope" and Lou Leclaire Contracting Ltd. as "Leclaire Contracting".
3. At the commencement of these proceedings it was the contention of the U.A. that the Board lacked jurisdiction to entertain this complaint in that at the relevant time the necessary pre-conditions for a proper complaint under section 91(1) had not been met. The Board, however, rejected this contention and ruled orally that it did have jurisdiction to entertain the complaint. What follows are the reasons for that ruling.
4. Scope is basically a mechanical contractor, although it does at times also act as a general contractor. Scope is bound to a provincial agreement between the U.A. and the Mechanical Contractors Association of Ontario which covers plumbers, steamfitters, pipefitters and welders. Article 11 of the agreement provides that work "coming under the jurisdiction of the agreement" shall not be sub-let to firms not signatory to a U.A. agreement. Early in 1983 Scope obtained a contract from a hospital in Owen Sound to perform some work connected with a proposed future expansion to the Hospital. The work included the installation

and relocation of certain site services, sewers and watermains. Scope regarded certain of the work on the project as work coming within the jurisdiction of the U.A. and accordingly directly employed a number of U.A. plumbers to perform it. Scope sub-contracted the remainder of the work to Leclaire Contracting. Included in the sub-contract was the relocation of a number of storm and sanitary sewers beyond the first manhole from the Hospital building. Although Scope did not regard this work as coming within the jurisdiction of the U.A., Mr. Jack Porter, the business manager of U.A. Local 527, did. In giving his testimony Mr. Porter acknowledged that it is not uncommon for construction labourers to perform the type of work in question.

5. Initially, Mr. Porter had been of the view that a relationship existed between Scope and Leclaire Contracting such that the two constituted a single employer. Doubtless this view arose from the fact that Leclaire Contracting rents office space from Scope in the Town of Markham. In these proceedings Mr. Lou Leclaire, the owner of Leclaire Contracting, indicated that there was no direct linkage between his firm and Scope. Mr. Leclaire testified that in the preceding year Leclaire Contracting had performed about one and a quarter million dollars worth of work, of which less than twenty per cent had come from Scope. Section 1(4) of the Act empowers the Board to treat associated or related activities or businesses that are being carried on under common control or direction as a single employer. In these proceedings, however, counsel for the U.A. expressly stated that he was not relying on section 1(4).

6. Leclaire Contracting started working on the Hospital project on or about March 7, 1983. It employed members of the Labourers' Union to perform the work in question. On or about March 9, 1983 Mr. Porter drove to Markham and met with Mr. Bill West, the president of Scope and Mr. Lou Leclaire, the president of Leclaire Contracting. Mr. Porter met first with Mr. Leclaire. Mr. Porter indicated to Mr. Leclaire that he regarded the work in question as plumbers work, and that because (in his view) Scope and Leclaire Contracting were one employer, Leclaire Contracting was bound to the U.A. provincial agreement. Mr. Leclaire testified that Mr. Porter told him that he wanted Leclaire Contracting to employ U.A. plumbers to perform the work in question. Mr. Porter denied that he had told Mr. Leclaire to hire U.A. employees, although he did indicate that he may have advised Mr. Leclaire that he had to sign a collective agreement with the U.A. In cross-examination Mr. Porter agreed with the suggestion that if Mr. Leclaire had agreed to sign an agreement with the U.A. and hire U.A. members to perform the work, that would have ended the matter.

7. Before leaving Mr. Leclaire's office, Mr. Porter handed Mr. Leclaire a grievance. The grievance read, in part, as follows:

“NAME OF UNION REPRESENTATIVE

(Print & Sign) Jack Porter
“Jack Porter”

LOCATION OF WORK COVERED BY THIS REPORT

Dr. Phillips Mackinnon Hospital,
R. R. #6 Owen Sound, Ontario. N4K 5N8

NAME OF CONTRACTOR

Lou Leclair Contracting Ltd. 1271
Dennison Unionville, Ontario. L3R 4B5

NAME(S) OF GRIEVING EMPLOYEE(S)

Union Local 527 96 Union Street East,
Waterloo, Ontario. N2J 1C2

DATE March 9, 1983

a) Nature of Grievance and Date of Occurrence: Tuesday, March 8, 1983. Because Lou Leclair Contracting Ltd. is related to Scope Mechanical Contracting Ltd., therefore Lou Leclair Contracting Ltd. is in violation of the provincial agreement for doing work contrary to the provincial agreement.

b) Remedy or Correction Requested: U.A. members to be hired immediately to replace other workers performing the work under U.A. jurisdiction. Also, that the contractor pay to the union all monies lost due to others performing the work. In addition, we ask for all legal cost to be borne by the contractor."

On March 15, 1983 the U.A. referred this grievance to the Board for determination pursuant to section 124 of the Act (File No. 2608-82-M). The matter came on for hearing before the Board on March 29, 1983. At the hearing the U.A. requested and obtained leave from the Board to withdraw the referral.

8. After leaving Mr. Leclaire's office, Mr. Porter went to see Mr. West, the president of Scope. In a discussion about the work Mr. Porter contended it came within the jurisdiction of the U.A., to which Mr. West replied that prevailing practice was to have the work performed by construction labourers. Mr. Porter handed Mr. West a grievance, the relevant portions of which stated:

"Nature of Grievance and Date of Occurrence: Tuesday, March 8, 1983. That Scope Mechanical Contracting Ltd. is in violation of the provincial agreement article II - Sub-contracting.

b) Remedy or Correction Requested: U. A. Members to be hired immediately to replace other workers performing the work under U.A. jurisdiction. Also, that the contractor pay to the union all monies lost due to others performing the work. In addition, we ask for all legal cost to be borne by the contractor."

This grievance was referred to the Board pursuant to section 124 of the Act on March 15, 1983 (File No. 2609-83-M). At a hearing on July 20, 1983 the Board ruled that it would defer a consideration of the merits of the grievance until a conclusion of these proceedings under section 91.

9. As already indicated, the U.A. submits that the facts of this case do not meet the pre-conditions for a work assignment dispute set out in section 91(1) of the Act. Section 91(1) provides as follows:

“The Board may inquire into a complaint that a trade union or council of trade unions, or an officer, official or agent of a trade union or council of trade unions, was or is requiring an employer or an employers’ organization to assign particular work to persons in a particular trade union or in a particular trade, craft or class rather than to persons in another trade union or in another trade, craft or class, or that an employer was or is assigning work to persons in a particular trade union rather than to persons in another trade union, and it shall direct what action, if any, the employer, the employers’ organization, the trade union or the council of trade unions or any officer, official or agent of any of them or any person shall do or refrain from doing with respect to the assignment of work.”

10. For section 91(1) to apply in this case, it must be because the U.A. required an employer to assign work to members of the U.A. rather than to construction labourers belonging to the Labourers Union. In *Napev Construction Ltd.* [1980] OLRB Rep. Feb. 247, the Board indicated that a general contractor who has sub-let work cannot be viewed as the employer of the employees performing the work, and accordingly, a union’s approach to a general contractor alleging a violation of the sub-contracting provision in a collective agreement will not, by itself, give rise to work assignment dispute within the meaning of section 91(1). Accordingly, it would appear that neither Mr. Porter’s discussion with Mr. West nor the U.A. grievance against Scope was sufficient to create a work assignment dispute within the meaning of section 91(1).

11. The situation with respect to Leclaire Contracting, however, was quite different. Leclaire Contracting was the employer of the employees performing the work. Accordingly, if the U.A. required that Leclaire Contracting assign the work in dispute to U.A. members instead of construction labourers, the requirements for a complaint under section 91(1) would have been met. At the hearing, counsel for the U.A. contended that at no point had the U.A. requested the work from Leclaire Contracting. As for the grievance against Leclaire Contracting, counsel contended that it should not be given any weight in that it had been based on the false assumption that Leclaire Contracting was bound to the U.A. provincial agreement. We are unable to accept this contention. Even if we were to accept that Mr. Porter did not verbally state to Mr. Leclaire that his firm should employ U.A. members, the U.A. grievance against Leclaire Contracting certainly did so in no uncertain terms. Indeed, the grievance expressly sought to have “U.A. members...hired immediately to replace other workers performing the work under U.A. jurisdiction”. The fact that the demand may have been based on a false premise cannot in our view alter the fact that the demand was made.

12. Having regard to the above, the Board was satisfied at the hearing into this matter that the U.A. had required that Leclaire Contracting, an employer, assign work to persons in

one trade union, the U.A., rather than to persons in another trade union, namely, the Labourers Union. Accordingly, the Board was satisfied, and so ruled, that the pre-conditions for a complaint under section 91(1) had been met and that the Board had jurisdiction to inquire into the complaint.

2377-83-M International Association of Heat, Frost Insulators and Asbestos Workers, Local 95, Applicant, v. Standard Insulation Limited, Respondent

Construction Industry Grievance – Practice and Procedure – Witness – Person served summons on afternoon prior to hearing date not attending hearing – Witness not given reasonable notice – Board finding summons not duly served – Not issuing bench warrant in circumstances

BEFORE: R. A. Furness, Vice-Chairman, and Board Members H. Kobryn and J. A. Ronson.

APPEARANCES: *L. Steinberg and E. Walsh for the applicant; no one appearing for the respondent.*

DECISION OF THE BOARD; February 13, 1984

1. The applicant has referred a grievance concerning the interpretation, application or alleged violation of a collective agreement to the Board for final and binding determination.

2. At the hearing in this matter on February 2, 1984, the applicant informed the Board that it had served a subpoena *duces tecum* together with conduct money of \$41.00 on Mr. F. Pilgrim with respect to attendance at the hearing and that Mr. Pilgrim was not in attendance before the Board. The applicant asked the Board to issue a bench warrant so that Mr. Pilgrim could be apprehended and brought to the hearing in order to give evidence. It was the position of the applicant that Mr. Pilgrim's evidence was necessary in order for the applicant to establish its claim before the Board. After hearing evidence and argument the Board ruled that it would not issue a bench warrant. The Board caused this referral to be listed for continuation of hearing on February 16, 1984, and stated that this panel of the Board was not seized with this referral. The Board now sets forth its reasons for not issuing a bench warrant.

3. The hearing in this matter was held on February 2, 1984. Alexander Taggart, the business manager of the applicant, gave evidence regarding the service of the summons on Mr. Pilgrim. Mr. Taggart attempted to serve the summons on Mr. Pilgrim during the evening of January 31, 1984. He visited Mr. Pilgrim's house at about 7:30 p.m. and spoke to Mrs. Pilgrim, who informed him that Mr. Pilgrim had left the house about twenty minutes earlier. She informed Mr. Taggart that she did not know where her husband was going. Mr. Taggart then visited Mr. Pilgrim's office in Hamilton. However, no one was present at Mr. Pilgrim's office. The next morning at about 9:00 a.m. Mr. Taggart again visited Mr. Pilgrim's office and again found no one there. However, Mr. Taggart returned to Mr. Pilgrim's office on the same day between 2:30 and 3:00 p.m., saw him and served him with the summons and \$41.00 in conduct money. Mr. Taggart gave Mr. Pilgrim a copy of the summons and told him that he was being summoned to appear before the Board on February 2, 1984. Mr. Pilgrim wanted

to know what the summons was about and Mr. Taggart informed him that the summons spoke for itself and that he was to attend at the Board on February 2, 1984. Mr. Pilgrim replied that he had to run the business and told his assistant to telephone the Board and state that he could not attend on February 2, 1984. Mr. Taggart reiterated that Mr. Pilgrim had to attend at the Board. Mr. Pilgrim replied, "We'll see". There was nothing before the panel to indicate that Mr. Pilgrim or anyone on his behalf telephoned the Board in connection with the service of a summons.

4. The applicant argued that Mr. Pilgrim had been duly served and that the material in Mr. Pilgrim's possession was relevant and necessary for the presentation of its referral to the Board. The applicant requested a bench warrant for Mr. Pilgrim so that the applicant could have the material in his possession. The applicant argued that even though the summons was served the afternoon before the hearing, Mr. Pilgrim would have received notice of the hearing at about the same time as the applicant, namely, January 23, 1984. It was the applicant's position that Mr. Pilgrim had received reasonable notice of the hearing.

5. The Board is aware that this is not the first time that Mr. Pilgrim has failed to appear before the Board when served with a subpoena. See *Standard Insulation Limited*, [1983] OLRB Rep. June 986. In that decision the Board issued warrants for the arrest of two defaulting witnesses, including Mr. Pilgrim, where it was satisfied that they were properly served with summonses to appear at the hearing and were paid the required conduct money. There is no indication in that decision of the circumstances of the service of the summons.

6. The authority of the Board to summon and enforce the attendance of witnesses is provided for in section 103(2)(a) of the *Labour Relations Act*. Sections 44(8) and 124(3) also provide for the power of an arbitrator or the chairman of an arbitration board or the Board to summon and enforce the attendance of witnesses. The instant referral has been made under section 124 of the *Labour Relations Act*. When the Board is acting as an arbitrator the enforcement procedures contained in sections 12 and 13 of the *Statutory Powers Procedure Act* do not apply to arbitrators under the *Labour Relations Act*. See section 3(2)(d) of the *Statutory Powers Procedure Act*, *Casalbil Contractor Limited*, [1980] OLRB Rep. Sept. 1278, and *Re International Association of Heat & Frost Insulators & Asbestos Workers Local 95 and Master Insulators Association of Ontario et al.* 99 D.L.R. (3d) 757; 25 O.R. (2d) 8. The power to enforce the attendance of witnesses when the Board is entertaining a referral under section 124 is therefore to be found in the provisions of the *Labour Relations Act*. Under the provisions of section 103(2)(a), the Board has the power to enforce the attendance of witnesses in the same manner as a court of record in civil cases. This authority includes that power to issue a warrant for the arrest of a person who has failed to appear when duly served with a summons. See *Casalbil Contractor Limited*, *supra*, at page 1279. The powers which the Board currently exercises in this regard with respect to proceedings under section 124 were formerly exercised by it with respect to all of its proceedings under the Act before the application of the *Statutory Powers Procedure Act* to the Board.

7. Although the Board has the power to issue a bench warrant, such a power ought to be used with caution and fairness. As the Board pointed out in *Sentry Department Stores Limited*, [1964] OLRB Rep. Feb. 642, the issuance of a warrant for the arrest of a defaulting witness is a most serious step affecting the personal liberty of the individual and should not be considered by the Board unless the circumstances plainly substantiate the necessity for such action. There is a responsibility on a party wishing to produce evidence through a witness to

ensure that the witness is available at the hearing before the Board. This responsibility is satisfied where a witness has been properly served within a reasonable time prior to the hearing with a summons and the necessary conduct money which would compel his attendance. See *North American Plastics Co. Limited*, [1967] OLRB Rep. Nov. 764, and *Fort Henry Hotel* 52 CLLC ¶17,011.

8. In the instant referral Mr. Pilgrim was served with a summons on the afternoon prior to the hearing even though the applicant was aware of the date of the hearing as early as January 23, 1984. Whether a person has been duly served involves not only a consideration of the form of the summons, the information contained therein and the receipt of conduct money; it also involves the question of the reasonableness of the notice given to a person prior to the time and date fixed for the hearing. Mr. Pilgrim apparently operates a business and immediately protested to Mr. Taggart his inability to attend the hearing on February 2, 1984. Even allowing for the fact that Mr. Pilgrim lives close to Toronto, in all the circumstances he was entitled to at least one day's clear notice of a requirement to attend at the Board's hearing in Toronto. Even where one day's notice has been given, a person who has been served with a summons may still have a good and sufficient reason for failing to respond to the summons. The Board is not prepared to find that Mr. Pilgrim was duly served with the summons.

9. The applicant argued that Mr. Pilgrim received notice of the hearing on January 23, 1984. Even assuming that this was true, notice of a hearing is very different from notice of a requirement to attend that same hearing as a witness pursuant to a duly served summons. A respondent is under no obligation to attend a referral under section 124. Indeed, paragraph 6 of Form 105, Notice to Respondent of Referral of Grievance to Arbitration under Section 124 and of Hearing, Construction Industry, states:

If you do not attend at the hearing, the Board may proceed in your absence and you will not be entitled to any further notice in the proceedings.

10. For the foregoing reasons, the Board refused to issue a bench warrant for Mr. Pilgrim on February 2, 1984. The Registrar is directed to list this referral for continuation of hearing on February 16, 1984.

1860-83-U Graphic Arts International Union Local 517, Complainant, v. Sumner Press, Respondent v. Becky La Mantia and Mary Moore, Interveners

Interference in Trade Unions – Unfair Labour Practice – Picketers observed having friendly conversation with employer charged under constitution for “strike-breaking” – Board finding union position ridiculous – Request for discharge of employees losing membership for failing to pay fine refused by employer – Not unlawful interference by employer – Board not directing discharge of employees

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members L. Collins and W. H. Wightman.

APPEARANCES: *G. A. Beasley, R. Berman and J. Holmes for the complainant; Richard Rosenthal for the respondent; Becky La Mantia and Mary Moore on their own behalf.*

DECISION OF THE BOARD; February 10, 1984

1. This is a complaint under section 89 of the *Labour Relations Act* alleging that the respondent employer has contravened sections 46, 50, and 64 of the Act. A hearing in this matter was held in Windsor, Ontario on January 26, 1984. As it turned out, most of the facts were not substantially in dispute.

2. The respondent employer, as its name suggests, operates a printing business in Windsor. The intervening employees, Becky La Mantia and Mary Moore, are employees of the respondent and, until recently, members in good standing of the complainant union. Ms. Moore has been an employee and a union member for eleven years. Ms. La Mantia has been employed for six and a half years and has been a union member for about three years.

3. The respondent has historically had an amicable relationship with both its employees and the various unions which have represented them over the years. The founders of the company were former union members and, as in many small businesses, adopted a paternalistic approach to the employees whose labours contributed to their success. In 1972, the company unilaterally introduced a profit sharing plan in addition to the wage and benefit package established in the collective agreement. Following profitable years in 1978 and 1979, the company decided to issue shares to all employees with six years of service. In some thirty years of collective bargaining there have been only two work stoppages: a “weekend strike” a dozen years ago, and a short lockout in 1982. There is no pattern of unfair labour practices, nor any real evidence of antipathy to trade unions in general, or the complainant union in particular. Certainly there is no evidence that the conduct complained of in this case was part of a scheme to subvert the collective bargaining relationship.

4. The chain of events giving rise to this proceeding begins with the lockout in the summer of 1982. At the time, the company was a participant in an informal process of coalition bargaining. The employers involved had agreed among themselves that if any one of them was subjected to strike action or picketing, the others would lock out their employees. However, there was nothing particularly novel about this round of negotiations. The same pattern of coalition bargaining had been used in the past. This time, however, bargaining reached an impasse, the union took action against one of the employers, and the others, including the

respondent, responded with a lockout. Ms. Moore and Ms. La Mantia were locked out along with the other two full-time and two part-time members of their small bargaining unit. The employees of the respondent in the other bargaining unit represented by the complainant continued to work.

5. Once the lockout was imposed, the union began picketing the respondent's premises. Ms. Moore and Ms. La Mantia took part in that picketing. Indeed, the evidence establishes that they spent more time on the picket line than most of the other members of their bargaining unit whose loyalty to the union, it seems, did not extend to interfering with their plans for the Labour Day long weekend. The interveners thought they were required to picket for nine hours a day – and did. It is but one of the several ironies in this case that David Moore, a fellow employee who would later allege that the interveners had evaded their picketing responsibilities, was among those who decided to leave the line on the Friday before Labour Day, so that he could enjoy an extended long weekend.

6. Because the bargaining unit was so small, the picket line at the respondent's premises was occasionally visited by forty or fifty other members of the Local union who paraded in solidarity with those who had been locked out. Such episodes of mass picketing lasted for about half an hour each morning, then the pickets would leave. During these periods, Mr. Rosenthal, the company president, usually came outside to make sure that there were no problems. The respondent shares a common driveway with other companies, and Rosenthal wanted to make sure that his difficulties did not unduly interfere with his neighbours.

7. During one such episode of mass picketing Mr. Rosenthal had occasion to have a brief conversation with three of his employees who, at the time, were standing a little apart from the main group of picketers whom Rosenthal did not know. That conversation led to charges against the three employees under the union constitution, the expulsion of Ms. Moore and Ms. La Mantia, and, finally, a demand that Ms. Moore and Ms. La Mantia be fired. Since that remains the union's objective and is the remedy sought in this proceeding, it is interesting to consider just what was said in that brief discussion with Mr. Rosenthal.

8. The conversation occurred on the morning of September 7, 1982. There were about forty or fifty pickets near the company's premises, although there was no formal order to the picketing. Mr. Rosenthal approached three of his employees: the interveners and Michael Moore (no relation to either the interveners or David Moore who at the time was also in the unit). Rosenthal asked if there were any problems, and indicated that they were free to use the washrooms or the company's coffee machine if they wished to. The interveners replied that there were no difficulties except for a missing motorcycle, believed to have been stolen from one of the neighbouring companies. The interveners then pointed in the direction of the company in question. Mr. Rosenthal suggested that it was too bad that the employees were not working. Ms. La Mantia replied that it was unfortunate that the two sides couldn't reach agreement (as they did a few days later) so that the strike could be settled and everyone could go back to work. She also enquired about the son of a fellow employee who was very ill and receiving treatment. At some point during the conversation there were remarks about the hot weather and someone suggested that perhaps the employees should be wearing their bikinis while picketing – a suggestion which they all thought was amusing.

9. That was the substance of the conversation. There was nothing mocking, malicious,

or disparaging about it, nor was there anything which could reasonably be construed as subversive to the union's interests. Yet that is apparently how some members of the union chose to characterize it. They regarded this entirely innocent conversation as a form of strikebreaking. The suggestion is ridiculous; and had the union officials made even minimal efforts to investigate or discuss their concerns with Ms. Moore and Ms. La Mantia, much subsequent unpleasantness (not to mention the expense of these proceedings) could have been avoided.

10. The International Union constitution provides for the discipline of union members who commit various "offences" against the interests of the union. One of the enumerated offences found at Article 20.2B of the constitution is "strikebreaking during any sanctioned strike or evasion of responsibilities during a recognized lockout". The interveners' conversation with Rosenthal was said to be a contravention of this article of the International constitution. They were charged with that offence and put on trial.

11. The terms of the constitution warrant some further comment. Article 20.4 entitled "Investigation" provides:

Except in the case of charges filed by a Local Executive Board or by the International Council (in either of which cases probable cause for trial shall be presumed), whenever charges are filed they shall first be investigated to determine whether there is probable cause for trial of the charges. In cases arising before a Local, such investigation and determination shall be made by the Local Executive Board....In cases which the Local Executive Board determines that there is no probable cause for trial, it shall so notify the charging party in writing who shall have the right to refer the matter to the membership meeting of the Local next following ten (10) days after such notice.

We mention this provision because the evidence before this Board is that none of the Local union executive members were direct witnesses of the interveners' alleged misconduct. The complaint against them was made by David Moore and three or four other individuals who were not identified. Accordingly, a superficial look at the constitution would suggest that when one member levies a charge against another, the local executive board should conduct an investigation to determine whether there is "probable cause" to put the accused on trial. If that happened in this case, the investigation did not extend to asking the interveners their side of the story. The executive board seems to have decided to press the charges itself, without ever discussing the alleged problem with the interveners, and as late as three months *after* the trial Ron Berman, the president of the Local, was refusing to advise the interveners who their accusers were. John Holmes, the co-chairman of the Windsor Local told this Board that he could not remember who had made the charges against Ms. Moore and Ms. La Mantia. We find this submission just a little difficult to believe; for Holmes was not only a member of the executive board with the responsibility for investigating and (as it turned out) prosecuting the complaint, but also a member of the trial board which sat in judgment. It is a little hard to understand how he could not recall either who made the allegations or whose evidence he heard before deciding that the interveners were guilty. And we but note in passing the interesting process in which the functions of investigator, prosecutor, judge and jury are combined in one group of individuals.

12. By letter dated November 11, 1982, Michael Moore and the interveners were advised that they were being charged with a breach of Article 20.2B of the constitution because they had been observed away from the picket line talking to their employer. It was alleged that: "during your period of conversation with your employer, you were observed to be laughing and gesturing towards those who were picketing in what was taken to be a mocking of those on the picket line". These charges, it will be noted, were framed more than two months after the alleged improper conversation on September 7, 1982. It remains a mystery why it took so long to press charges. Certainly, it would not have taken very long to investigate although, as we have already noted, such investigation as there may have been did not include any enquiry of Ms. La Mantia or Ms. Moore.

13. The interveners submit that the "real reason" for the charges against them was a dispute which they had with David Moore, the picket captain, and Ron Berman, the union president, about the payment of strike pay to those who had participated in picketing. The interveners had been told that before they would be eligible for strike pay, they would have to put in nine hours a day on the picket line. The interveners did so, but afterwards discovered that persons who had not met that obligation nevertheless were paid in full. They protested to the Local executive and later wrote to the International union president. The interveners note that it was only *after* they had appealed to the International union president that charges were laid against them at the Local level. In their view, the timing of the charges – two months after the lockout had been settled – was no coincidence.

14. The charges and the request that they appear for trial came as a considerable surprise to Ms. La Mantia and Ms. Moore. They thought the charges were preposterous – a reaction which is not surprising in the circumstances. Both wrote to the executive board to deny that they had done anything improper. In her letter, Ms. La Mantia indicates that she did not think there was anything wrong in her standing a little apart from a large group of strangers, nor was it unnatural to speak to her boss when he addressed her. She explains:

The third charge is a complete misunderstanding as I did not laugh at, gesture to, or mock any of these gentlemen as I had no reason to, and had nothing to gain by it. The only thing I can add is that I have reviewed the section I am being charged under and do not find anything that says you cannot laugh during a strike or lockout, nor do I see where you must picket in a specified area and did not read where you must ignore your employer.

15. One must presume that this denial of impropriety was before the executive board when it decided that the interveners should be penalized. The interveners' evidence was substantially the same before this Board. Moreover, in this proceeding, the union officials were hard pressed to identify anything which the interveners did wrong. When Mr. Holmes was asked whether the interveners had done anything wrong, he simply avoided the question.

16. The trial took place on December 8, 1982. Michael Moore was present to answer the charges against him. Ms. La Mantia and Ms. Moore did not appear. Michael Moore received a reprimand. The interveners were suspended for three months and required to pay a fifty dollar fine. John Holmes, a member of the trial board, testified that the board did not turn its mind to, or enquire about, what passed between the interveners and Mr. Rosenthal. Its focus was on what Michael Moore had to say. No one asked about the general tenor or

text of the conversation, even though Michael Moore was a participant and obviously in the best position to explain what transpired, and what was said. But no one asked. One would have thought that before imposing a penalty upon Ms. La Mantia and Ms. Moore – particularly a heavier one than on Michael Moore – the executive board would have enquired about what in fact they said, and whether in fact there were any deprecating comments or mocking gestures.

17. Ms. Moore and Ms. La Mantia should have attended the trial, even though they believed the charges to be totally unfounded. But they did not. Ms. La Mantia went to the airport to meet relatives who were arriving from out of town, and Ms. Moore stayed home with her children. Neither requested an adjournment. Both chose to ignore a proceeding which they believed to be unwarranted and unfair. By declining to take part, they merely compounded their difficulties.

18. The decision of the trial board was confirmed at a Local membership meeting held on February 9, 1983. The three-month suspension was made effective from March 1, 1983, to May 31, 1983, and the fifty dollar fine was made due and payable as of March 1, 1983. By letter dated February 21, 1983, the interveners were advised of this determination and warned that if the amount was not paid within thirty days, they would become in arrears in dues in accordance with the Local bylaws and would face possible expulsion from the union. The bylaws provide that union dues deducted automatically from the employees' wages will first be applied to outstanding fines or penalties. As a result, an employee can be in jeopardy of expulsion from the union, and loss of his job even though his dues are fully paid.

19. Ms. Moore and Ms. La Mantia refused to pay. By letter dated June 1, 1983, they were again warned that they might face expulsion and were advised that if the fine were paid they could still appeal under the terms of the International constitution. Copies of the constitution and bylaws were provided. The interveners did not appeal. They testified that they did not fully understand the appeal process; however, it is apparent that they were also influenced by their belief that the entire process was unfair and an appeal would be fruitless. The interveners were expelled from the union on or about July 18, 1983. By letter dated September 13, 1983, they were warned that if they did not pay the fine the union would approach their employer and demand that they be discharged.

20. On or about September 13, 1983, Ron Berman, the president of the Local, met with Mr. Rosenthal. During that meeting, Berman advised that the Local would be demanding that the interveners be discharged. Mr. Rosenthal indicated that he would not do so. In his view, their termination was not required by the terms of the collective agreement. Rosenthal pointed out Article 2.01 of the agreement which reads as follows:

All employees, including working Supervisors I and working Supervisors II, in the bargaining unit, must be members of the Union in good standing on the effective date of this Agreement and must as a condition of employment maintain their membership in good standing for the life of this agreement. *To keep his or her membership in the Union in good*

standing, an employee, must pay amounts required of union members under Article 19, Check-off.

[emphasis added]

Article 19 reads:

19.01 The company agrees, upon receipt of a written non-revocable authorization, to deduct weekly from the wages of each employee, a stated amount to be determined by the Union. Such authorization shall be signed by each employee as a condition of employment.

19.02 All employees who, as of the date of signing of this agreement, have previously signed authorizations allowing the company to deduct weekly from the wages of the employee, a stated amount to be determined by the Union, shall, as a condition of continued employment, be required to continue to have deducted from their wages such stated amounts to be determined by the Union.

19.03 Such amount will be determined by Union resolution, a certified copy of which will be remitted to the company concerned.

19.04 The company will remit monthly to the Local concerned, the amounts so deducted but not later than the 20th of the following month.

19.05 If the company is in default in making payments required under this article for more than thirty (30) days, it shall be liable for and agrees to pay, such legal, court and/or other costs incurred in the collection proceedings, and the union may take any action it deems advisable, notwithstanding any provisions of this agreement.

21. Berman testified that he had difficulty understanding the second sentence in Article 2.01. In his view, it appeared to be redundant. However, according to Mr. Rosenthal, the addition to Article 2.01 was designed to prevent precisely the kind of problem with which he was then confronted.

22. Mr. Rosenthal explained that in the mid-1960's, the employers in the area were having problems because of internal strife within the International Typographical Union. Rivalry and dissent within the union had resulted in the expulsion of dissenters and a demand of their employers that they be discharged. The employers had no wish to meddle with the internal affairs of the union but, by the same token, they did not wish to lose skilled workers whom they had made the effort to train. Accordingly, the employers decided to insert language so that, for the purposes of the agreement, "membership in good standing" would be defined in terms of payment of dues and assessments pursuant to Article 19 of the agreement. Whether a union fine would fit into the terms of Article 19 we need not determine because, the fact is, the procedural requirements contemplated by Article 19 were not followed. Berman indicated that he never considered demanding that the fine be deducted by the employer from the employees' wages.

23. We need not make any final determination about what Article 2.01 means. It suffices to say that Mr. Rosenthal's interpretation is an entirely plausible and a reasonable response to the union's demand that the interveners be fired. In his submission, the terms of the collective agreement did not entitle the union to require the discharge of Ms. Moore and Ms. La Mantia so long as their dues were being properly deducted. Mr. Rosenthal verified with his accountant that the amounts demanded by the union had been deducted. (He did not know about the provision in the union's bylaws by which sums deducted as dues were in fact applied to the payment of outstanding fines.) Rosenthal's position was that the employees' dues had been paid and that he could not be required to fire them.

24. It is this position which the union now contends is an unfair labour practice. The union asserts that the respondent is wilfully interfering with the internal affairs of the union and seeking to subvert the union's constitutional requirements. The union demands that this Board direct the employer to discharge Ms. Moore and Ms. La Mantia, and further, that the Board treat that discharge as having been effective as of November 8, 1983, when the company advised the union, in writing, that it would not fire the two employees. The reason for this latter submission is that on or about November 17, 1983, Ms. La Mantia and Ms. Moore were served with copies of the instant complaint in which it was evident that the union was seeking their discharge. Their response, on January 4, 1984, was to make application to this Board for termination of the union's bargaining rights. There are currently only three employees in the bargaining unit. Given the circumstances of this case, it is evident that if the interveners were employees in the unit at the time of the termination application the union would face some difficulty in demonstrating that their desire to be rid of the union was not sincere and voluntary. Counsel for the union conceded as much when he indicated that unless the section 89 complaint was entirely successful, the termination application might become "moot".

25. The union argues that the respondent's failure to fire Ms. La Mantia and Ms. Moore is a breach of Article 2.01 of the collective agreement and an interference with the administration of the trade union and its constitutional processes. We do not agree. The respondent's interpretation of the collective agreement is arguably right, certainly reasonable, and not motivated by any intention to interfere with the internal affairs of the union. If there is a difference as to the interpretation of the collective agreement, that is a matter which should be resolved by arbitration. No doubt Mr. Rosenthal is anxious not to lose two good employees who have worked for him for years. However, we do not think this expression of loyalty or the assertion of an entirely *bona fide* contractual interpretation constitutes an unfair labour practice. While there may be cases where non-compliance with the terms of a collective agreement will trigger liability under section 64 of the Act, this is certainly not one of them.

26. For the foregoing reasons, we are unanimously of the view that this complaint must be dismissed.

1813-83-R; 2001-83-M International Brotherhood of Electrical Workers, Local 303, Applicant, v. **Twin Electric** and Ermac Power & Control Ltd., Respondents

Bargaining Rights – Voluntary Recognition – Contracting Company authorizing employer association to enter into collective agreement on its behalf – Behaving as if member of employer association – Collective agreement conferring bargaining rights on applicant union by voluntary recognition

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members W. H. Wightman and F. S. Cooke.

APPEARANCES: *B. Fishbein, A. Glen and R. Tersigni for the applicant; no one for the respondent Twin Electric; R. A. Werry, J. Tascona and F. Krause for the respondent Ermac Power & Control Ltd.*

DECISION OF THE BOARD; February 23, 1984

1. This is an application under sections 1(4) and 63 of the *Labour Relations Act*, together with the referral of a grievance to the Board under section 124 of the Act. The trade union seeks a declaration and relief against Ermac Power & Control Ltd., whom it claims to be a successor or related employer to a company called Twin Electric.

2. Twin Electric was formed to carry on an electrical-contracting business in 1973. It has been operated by John Krause, who, with his wife, was co-owner of the business. Mr. Krause himself has always been a member of the applicant trade union. He has throughout the history of Twin Electric abided by all of the terms and conditions of the applicant's collective agreement, and has acted as if Twin were a member of the Niagara Peninsula Electrical Contractors Association, an employers' organization which carried on the local area bargaining with the applicant in the days before province-wide bargaining. It was only subsequent to the filing of this application for Ermac, and for whom Mr. Krause has now gone to work, that Mr. Krause first raised with either the applicant or the employers' organization the possibility that he was not bound by their successive collective agreements, nor even a member of the Niagara Peninsula Electrical Contractors Association.

3. The facts are not in dispute. As stated, Twin Electric has always abided by the full terms of the collective agreements negotiated with the applicant by the Association. The only dues payable to the Association are through the trustee established by virtue of the Employers' Fund under the collective agreement, and Twin has always paid them. The Association included Twin Electric on its list to the union of employers for whom it bargained, and the union included Twin on its list of approved union subcontractors for the area. When Mr. Krause needed employees, he obtained them through the union hiring hall, and he always employed apprentices approved under the provisions of the applicant's collective agreement. Mr. Krause regularly attended the meetings convened by the Association to discuss the status of negotiations with its members, and in fact took part in the voting to ratify successive settlements. Mr. Krause acknowledges that portion of the Minutes of the May 8, 1980 ratification meeting which reads:

“J. Krause commented that while the contract is reasonable, it is going to result in more work lost to *non-union contractors* and in-plant forces.”

(emphasis added)

Mr. Krause regularly attends the annual general meeting of the Association as well and concedes, as the Minutes disclose, that he has participated in those meetings to the extent of moving or seconding motions, including a motion to establish a separate schedule of dues for “non-union contractors” wishing to become members. When the Association became incorporated in 1979 for the first time, it asked its “members” to execute a new form of “Membership Application” in the name of the incorporated Association, and Twin’s application was routinely returned with the corporate seal on it. Mr. Krause testified that he has no knowledge of who in his office executed the application form in that manner.

4. Counsel for Twin now argues that Twin never did join the Association prior to the advent of province-wide bargaining, and that in fact it could not have, because membership had been restricted under the constitution to contractors for whom the trade-union party already had bargaining rights. Counsel argues that such bargaining rights never had been obtained, through either the certification or voluntary-recognition route.

5. The Board agrees that the province-wide bargaining provisions of the Act, like the accreditation provisions before them, do not confer bargaining rights with respect to an employer *in the first instance*. The initial source of bargaining rights must be a certification or voluntary recognition. The Niagara Peninsula Electrical Contractors Association has, however, purported to enter into successive collective agreements on behalf of Twin Electric, *inter alia*, and those collective agreements specifically provided:

5.00 The Association, on behalf of its member companies agrees to recognize the Union as the Collective Bargaining Agent for all employees of the Association who perform electrical work coming within the scope of this agreement, while working within the boundaries of the jurisdictional area of the Local Union.

Not only did Twin Electric specifically authorize the Association, by its conduct, to enter into those collective agreements on its behalf, but it at all times behaved as if it were a “member” of the Association as well. The only thing which Twin could have done to demonstrate its membership that it did not do would have been to make formal application to be admitted some time prior to 1979. But it appears from the Association’s records that that kind of formality was not engaged in by any member companies in the earlier years of the Association. We note that eligibility under the Association’s constitution is extended to contractors who have “expressed a willingness to enter into negotiations for [a collective agreement]”, but even if that is not technically sufficient to extend membership to Twin Electric in the first instance, we find that Twin has participated in the benefits of full membership for too long to now deny that status. There is, in the circumstances, no reason to find that the full effect of section 51(1) of the Act, which provides:

A collective agreement between an employers’ organization and a trade union or council of trade unions is, subject to and for the purposes of this Act, binding upon the employers’ organization and each person who

was a member of the employers' organization at the time the agreement was entered into and on whose behalf the employers' organization bargained with the trade union or council of trade unions as if it was made between each of such persons and the trade union or council of trade unions and upon the employees in the bargaining unit defined in the agreement, and, if any such person ceases to be a member of the employers' organization during the term of operation of the agreement, he shall, for the remainder of the term of operation of the agreement, be deemed to be a party to a like agreement with the trade union or council of trade unions

does not apply to Twin. This case is a far cry from one like *Bechtel Canada* (unreported), Board File No. 0745-75-R, released September 3, 1975, in which the company appears to have had nothing whatever to do with the employers' association other than to apply the terms of the collective agreement which it negotiated for the area.

6. We accordingly find that the first collective agreement entered into on Twin's behalf at the same time conferred voluntary recognition on the applicant, and that bargaining rights were continued under each successive collective agreement to the present.

7. In light of this finding, it will, of course, not be necessary to call upon counsel for the applicant for further argument, and the Registrar is directed to list this matter for continuation of hearing on the successorship and/or "related" employer issues.

0572-83-R Ontario Nurses' Association, Applicant, v. Victorian Order of Nurses, Lakehead Branch, Respondent

Employee – Community co-ordinator/case managers not having any of usual indicia of management authority – Held to be "employees" – Held to be employed in nursing capacity though not performing "hands on" patient care duties

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members J. Wilson and C. A. Ballentine.

APPEARANCES: *Dan Anderson for the applicant; F. J. W. Bickford for the respondent.*

DECISION OF THE BOARD; February 28, 1984

1. This is an application for certification.

2. When this matter initially came on before the Board for hearing, the respondent raised certain objections to the composition of the bargaining unit proposed by the applicant union. In particular, the respondent asserted that the "assistant nursing supervisor" should be excluded on the grounds that she exercised managerial functions within the meaning of section 1(3)(b) of the Act and was not, therefore, an "employee" under the Act who could properly

be included in the unit. The respondent further contended that the some ten or eleven individuals employed as "community co-ordinator/case managers" also exercised managerial functions. In the alternative, it was contended that the "community co-ordinator/case managers" were not employed *in a nursing capacity* and that, on this independent basis, they should not be included in the proposed bargaining unit. The Board determined, however, that the union's right to certification could not be affected by the Board's ultimate decision as to the inclusion or exclusion in the bargaining unit of the individuals occupying the positions of "assistant nursing supervisor" and "community co-ordinator/case manager". Accordingly, pursuant to section 6(2) of the Act, the Board certified the applicant on an interim basis pending the resolution of the dispute concerning the final composition of the bargaining unit. The Board noted that a formal and final certificate must await the resolution of that matter, and appointed an Officer to inquire into the duties and responsibilities of the individuals whose status was in dispute.

3. Pursuant to the Officer's appointment to inquire into and report to the Board on the duties and responsibilities of the subject individuals, the Officer convened a meeting of the parties at the premises of the respondent in Thunder Bay on September 14, 1983. At that meeting, the parties were able to reach agreement that the "assistant nursing supervisor" did indeed exercise managerial functions within the meaning of section 1(3)(b) of the Act, and, accordingly, was not an "employee" who should properly be included in the bargaining unit. The parties were also able to agree that the evidence of Hazel McLean, one of the community co-ordinator/case managers would be representative of the group of individuals currently occupying that classification. The testimony of Ms. McLean was recorded and transcribed, as was the testimony of Ms. Ivy Isherwood, the respondent's district director. At the completion of this examination both parties were asked if they had any further evidence or witnesses that they wished to call and each of them indicated that it did not. In the course of the enquiry of the Officer, both parties were afforded full opportunity to be heard, to examine and cross-examine, and to introduce evidence bearing on the issues in dispute between them.

4. Following the release of the Officer's report (which, as noted, included a transcript of the witnesses' testimony), the applicant union made written representations as to the conclusions which, in its submission, the Board should reach on the basis of that evidence; and the respondent requested a hearing. Upon the respondent's request, the Board scheduled a hearing which was held in Toronto on December 16, 1983. A representative of the union appeared to make representations as did counsel for the respondent employer.

5. Section 1(3)(b) of the Act has been in the statute in its present form since 1957 when, after the decision of the Supreme Court in *Re OLRB Bradley et al. and Canadian General Electric Co. Ltd.*, [1957] O.R. 316 (C.A.), reversing [1956] O.R. 437 (O.H.C.), the Legislature amended the section to clarify the Board's jurisdiction and authority by adding the words "in the opinion of the Board" to the section. Section 1(3)(b) currently reads:

Subject to section 90, for the purposes of this Act, no person shall be deemed to be an employee,

• • • • •

(b) who, in the opinion of the Board, exercises managerial functions or

is employed in a confidential capacity in matters relating to labour relations.

The “mischief” to which the section is addressed and the Board’s general approach to its interpretation was discussed at some length in *The Corporation of the City of Thunder Bay*, [1981] OLRB Rep. Aug. 1121:

• • • •

[Excerpt containing paragraphs 2-6 inclusive omitted.]

[See also *Oakwood Park Lodge*, [1982] OLRB Rep. Jan. 84; application for judicial review dismissed; and generally, Sack and Levinson, *Ontario Labour Relations Board Practice*, (Butterworths) 1973, pp.25-34, and 1977 updating supplement, pp.9-14.]

6. We do not think it is necessary to undertake any exhaustive review of the Board’s decisions in the health care sector. Such review was conducted in *Oakwood Park Lodge*, *supra*, and need not be repeated here. Nor, in our view, is it necessary to reproduce in these reasons a condensation of the testimony appearing in the transcript. It suffices to say that, having carefully considered that testimony, we are unanimously of the opinion that the community co-ordinator/case managers do not exercise managerial functions within the intended meaning of section 1(3)(b) of the Act. Indeed, they have virtually none of the usual indicia of managerial authority and exercise none of the usual functions which might give rise to the kind of conflict, rooted in the adversarial nature of collective bargaining, that section 1(3)(b) was designed to avoid.

7. The evidence indicates that the alleged “managers” do not have any employees under their direction and control. They do not have responsibility for the quality or kind of work done by other employees. They do not instruct other employees on the manner in which their work should be done. They do not check or correct work of others. They do not assign work. They have no role to play in disciplining employees. They do not do job evaluations. They do not schedule employees’ working hours or vacations. They do not authorize overtime or grant casual time off. They have no real role in hiring, firing, employee transfers or layoffs. They are not involved in the determination of other individuals’ rates of pay. They have no significant role in the budgeting process and cannot be said to exercise the kind of significant executive decision-making responsibilities which would warrant the exclusion of senior members of management who may not have a direct role in personnel matters.

8. The evidence of the respondent’s district director confirms that “the co-ordinators” have no role in staffing, hiring, firing, layoff, or other personnel matters and no role in the billing/payment process. Their primary role is to assess and monitor the needs of patients referred to the programme by a physician and help co-ordinate the delivery of services (be they from other health care professionals or other community agencies) to meet those patient needs. That is a professional judgment of health needs made in conjunction with other health care professionals and, no doubt, will ultimately have some effect on the activities of the respondent’s other employees, as the respondent deploys its resources to meet the demand for them. But this no more makes the co-ordinators “managerial” (within the sense intended in a collective bargaining statute) than, in another context, salesmen who identify consumer demands in the market which a production facility seeks to meet. If the co-ordinator is of the opinion

that a particular patient requires nursing visits – as many of the patients in the home care programme do – more nursing visits may in fact be provided and the co-ordinator may continue to monitor the situation and discuss with the visiting nurse how things are going. But as to the nursing complement, whether nurses will be hired, whether part-timers or casuals will be called in, the scheduling of nursing staff, their wages, job evaluations and so on – all those matters are dealt with by individuals who *do* exercise the kinds of functions to which we have already referred and are therefore “management” in a traditional sense. The community co-ordinator/case managers are not.

9. Nor do we accept the respondent’s submission that the community co-ordinator/case managers are not employed “in a nursing capacity” – even though they do not personally do “hands on” patient care. At the present time all of the incumbents in this position are in fact registered nurses who, on the evidence, are employed in positions in which they are expected to be able to use their qualifications as a registered nurse. It is interesting to note that when a vacancy was advertised the respondent itself made it a qualification that applicants have a Bachelor’s Degree in nursing. If the respondent did not think that the successful individual should possess the training and skills of a nurse in order to properly carry out her work, why make that an advertised qualification for the job? It is also interesting to note that a number of the individuals in the co-ordinator position were R.N.’s who came from the respondent’s own “hands on” nursing group in what the director of the programme described as a “lateral transfer”. Moreover, the testimony of the co-ordinator who gave evidence indicates that she does in fact rely upon her nursing background and experience in carrying out her duties. She interacts with other members of the health care team and with physicians, exercising the diagnostic skills and professional judgment of a nurse. It may be that there is no regulatory requirement to have a nurse in this position and at some time in the past and early phases of the home care programme there was a co-ordinator who was not a registered nurse but a physical and occupational therapist. But that does not mean that those who are registered nurses and using their skills as such are not employed in a nursing capacity. It means only that the professional skills exercised by various health care professionals are not enclosed in watertight compartments, and that if the respondent were once again to hire a co-ordinator who was not a registered nurse, that individual would fall outside the nurses’ bargaining unit.

10. Having regard to the foregoing, a final certificate can issue to the applicant union in respect of a bargaining unit framed as follows:

“All registered and graduate nurses employed in a nursing capacity by the respondent in the City of Thunder Bay, save and except assistant nursing supervisor, nursing supervisor, and persons above the rank of nursing supervisor.”

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JANUARY 1984

BARGAINING AGENTS CERTIFIED

No Vote Conducted

1786-82-R: Canadian Union of Public Employees, (Applicant) v. Covenant House Under 21, Youth Foundation of Metropolitan Toronto, (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except co-ordinators, maintenance staff, housekeeping staff, Covenant House Community employees, cooks community relations officer, ombudsman, office, clerical and computer staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (71 employees in unit).

1525-83-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers Local 304, (Applicant) v. Canada Trustco Mortgage Company, (Respondent).

Unit #1: (*See Bargaining Agents Certified Subsequent to a Post-Hearing Vote*).

Unit #2: "all employees of the respondent at its Branch at 699 King Street, Cambridge employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except teller supervisors and persons above the rank of teller supervisor." (8 employees in unit). (*Having regard to the agreement of the parties*).

1698-83-R: Labourers' International Union of North America, (Applicant) v. Honeywell Limited, (Respondent).

Unit: "all employees of the respondent working at the George Drew Building, 25 Grosvenor Street, Toronto, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period, and persons covered by subsisting collective agreements." (9 employees in unit).

1824-83-R: Labourers' International Union of North America, Local 183, (Applicant) v. Bay Mills Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the City of Brampton, save and except plant manager, maintenance superintendent, persons above the rank of maintenance superintendent, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period." (33 employees in unit).

1851-83-R: Laundry & Linen Drivers and Industrial Workers, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Mylex Electronics Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (48 employees in unit). (*Having regard to the agreement of the parties*).

1923-83-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Applicant) v. Unlimited Textures Company Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at its Industrial Platers (Windsor) Company Division in Windsor, Ontario, save and except foremen, those above the rank of foreman, office and sales staff, and persons regularly employed for not more than twenty-four hours per week." (42 employees in unit).

2007-83-R: United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. Aristocraft Drywall Ltd., (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman". (2 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

2008-83-R: Ontario Public Service Employees Union, (Applicant) v. Community Legal Education Ontario, (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except managing director and persons above the rank of managing director." (12 employees in unit). (*Having regard to the agreement of the parties*).

2046-83-R: United Brotherhood of Carpenters and Joiners of America, Local Union 93, (Applicant) v. C. G. Kearney Construction Limited, (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

2056-83-R: United Steelworkers of America, (Applicant) v. Wiresmith Limited, (Respondent).

Unit: "all employees of the respondent at Mississauga, save and except foremen, persons above the rank of foreman, office, sales and technical staff, persons employed for not more than twenty-four hours per week and students employed during the school vacation period." (46 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

2076-83-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128, (Applicant) v. 515112 Ontario Limited, c.o.b. as Bluebird Construction, (Respondent).

Unit #1: "all boilermakers and boilermakers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foreman and persons above the rank of non-working foreman." (11 employees in unit).

Unit #2: “all boilermakers and boilermakers’ apprentices in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (11 employees in unit).

2111-83-R: United Food and Commercial Workers International Union, AFL, CIO, CLC, (Applicant) v. Canadian Vegetable Oil Processing Division of Canada Packers Inc., (Respondent).

Unit: “all employees of the respondent in the City of Hamilton, save and except forepersons, persons above the rank of foreperson, quality control, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (71 employees in unit). (*Having regard to the agreement of the parties*).

2115-83-R: Laundry and Linen Drivers and Industrial Workers Union, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Jones Apparel Group, Inc., (Respondent).

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff.” (3 employees in unit). (*Having regard to the agreement of the parties*).

2121-83-R: United Paperworkers International Union, (Applicant) v. Greif Containers Inc., (Respondent).

Unit: “all employees of the respondent in Fort Frances, Ontario, save and except foremen and persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (5 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

2130-83-R: United Brotherhood of Carpenters and Joiners of America, Local 93, (Applicant) v. Douglas Macdonald Development Corporation, (Respondent).

Unit #1: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (6 employees in unit).

Unit #2: “all carpenters and carpenters’ apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (6 employees in unit).

2145-83-R: International Union of Electrical, Radio and Machine Workers, (Applicant) v. Precious Plate Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent in the City of Mississauga, save and except foremen, persons above the rank of foreman, office and sales staff, laboratory staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (58 employees in unit). (*Having regard to the agreement of the parties*).

2147-83-R: Service Employees Union, Local 204, Affiliated with S.E.I.U., AFL, CIO, CLC, (Applicant) v. Nucleus Housing Inc., (Respondent).

Unit: “all employees of the respondent in Metropolitan Toronto, Ontario, save and except supervisors, persons above the rank of supervisor and office staff”. (24 employees in unit).

2157-83-R: Ontario Nurses Association, (Applicant) v. Residence Prescott & Russell Residence, (Respondent).

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent at Hawkesbury, Ontario, save and except Director of Nurses and persons above the rank of Director of Nurses." (7 employees in unit). (*Having regard to the agreement of the parties*).

2163-83-R: Labourer's International Union of North America, Local 506, (Applicant) v. Lee and Wilkinson Ltd., (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (9 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (9 employees in unit).

2169-83-R: United Food and Commercial Workers International Union, AFL, CIO, CLC, (Applicant) v. Baden Cheese Factory Limited, (Respondent).

Unit #1: "all employees of the respondent at Baden, Ontario, save and except director of quality control and product development, maintenance superintendent, forepersons, those above the rank of foreperson, office staff, sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (26 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent at Baden, Ontario, regularly employed for not more than 24 hours per week save and except director of quality control and product development, maintenance superintendent, forepersons, those above the rank of foreperson, office staff, sales staff and students employed during the school vacation period." (20 employees in unit). (*Having regard to the agreement of the parties*).

2172-83-R: Labourers' International Union of North America, Local 1059, (Applicant) v. Wall Systems of Canada Limited, (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

2184-83-R: Unit: "all employees of the respondent in Metropolitan Toronto save and except buyers, assistant managers and those above the rank of assistant manager." (47 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

2193-83-R: United Steelworkers of America, (Applicant) v. Redirack Limited/Redirack Limitee, (Respondent) v. Group of Employees, (Objectors), v. Millwright District Council of Ontario, (Intervener).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, students employed during the school

vacation period and persons covered by subsisting collective agreements in the I.C.I. sector.” (91 employees in unit). (*Clarity Note*).

2202-83-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, and Local Lodge 128, (Applicant) v. Tuberate & Besomar Company, Ltd., (Respondent).

Unit: “all employees of the respondent at Sarnia, Ontario, save and except non-working foreman, persons above the rank of non-working foreman, professional engineers, office and clerical staff.” (20 employees in unit). (*Having regard to the agreement of the parties*).

2212-83-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, U.A.W., (Applicant) v. Bendix Heavy Vehicle Systems Inc., (Respondent).

Unit: “all employees of the respondent in Guelph, Ontario, save and except foremen, and persons above the rank of foreman, and office and sales staff.” (38 employees in unit). (*Having regard to the agreement of the parties*).

2216-83-R: Ontario Public Service Employees Union, (Applicant) v. C.S.L. Services Group, (Respondent).

Unit: “all employees of the respondent at Conestoga College in the Regional Municipality of Waterloo regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period save and except supervisors and persons above the rank of supervisor.” (22 employees in unit). (*Having regard to the agreement of the parties*).

2222-83-R: The United Brotherhood of Carpenters and Joiners of America, Local 1030, (Applicant) v. The Corporation of the City of Brockville, (Respondent), v. The Canadian Union of Public Employees, (Intervener).

Unit: “all employees of the respondent regularly employed in its arenas, for not more than twenty-four (24) hours per week, save and except employees in the arena canteens, foremen and supervisors, persons above the rank of foreman and supervisor, and persons covered by subsisting collective agreements.” (6 employees in unit). (*Having regard to the agreement of the parties*).

2254-83-R: Ontario Nurses’ Association, (Applicant) v. Coleman Health Care Centre, (Respondent).

Unit: “all registered and graduate nurses employed in a nursing capacity by the respondent at Barrie, Ontario, save and except the Assistant Director of Resident Care and those above the rank of Assistant Director of Resident Care.” (7 employees in unit). (*Having regard to the agreement of the parties*).

2257-83-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Applicant) v. Central Consolidated Holdings Limited, (Respondent).

Unit: “all employees of the respondent in its Coulter Radiator Division and Carleton Radiator Division in the City of Windsor, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (41 employees in unit). (*Having regard to the agreement of the parties*).

2263-83-R: Christian Labour Association of Canada, (Applicant) v. United Springs Limited, (Respondent) v. Employee, (Objector).

Unit: “all employees of the respondent at Brantford, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff.” (8 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

2286-83-R: United Brotherhood of Carpenters and Joiners of America, Local 1669, (Applicant) v. Laurence Hoffman Contracting, (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the District of Rainy River, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

2289-83-R: Hotel Employees Restaurant Employees Union Local 75, (Applicant) v. Austrian Club (Edelweiss) Inc., (Respondent).

Unit: "all employees of the respondent in Metropolitan, Toronto, save and except supervisors, persons above the rank of supervisor, office and sales staff and persons regularly employed for not more than 24 hours per week." (10 employees in unit). (*Having regard to the agreement of the parties*).

2297-83-R: Labourers' International Union of North America, Local 837, (Applicant) v. Bonavista Construction, (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

2300-83-R: Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Applicant) v. Star Bottling Works Limited, (Respondent).

Unit: "all employees of the respondent at Sudbury, Ontario, save and except foremen or sales representatives, persons above the rank of foreman or sales representative, office staff, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period." (33 employees in unit). (*Having regard to the agreement of the parties*).

2320-83-R: United Food & Commercial Workers International Union Local 633, (Applicant) v. 561270 Ontario Inc., c.o.b. as St. Laurent I.G.A., (Respondent) v. Group of Employees, (Objectors).

Unit: "all Meat Department employees of the respondent in its stores in Ottawa, save and except the Department Manager, persons above the rank of Department Manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (10 employees in unit). (*Having regard to the agreement of the parties*).

2323-83-R: International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, U.A.W., (Applicant) v. C.M.C. Tool Inc., (Respondent).

Unit #1: "all employees of the respondent in Windsor, Ontario save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (17 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except foremen, persons above the rank of foreman, office and sales staff." (3 employees in unit). (*Having regard to the agreement of the parties*).

2336-83-R: International Molders & Allied Workers Union, (Applicant) v. Indal Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees at the Peachtree Door Canada Division of the respondent at Metropolitan Toronto, save and except foremen, persons above the rank of foreman, head shipper, office, technical and sales staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period.” (26 employees in unit). (*Having regard to the agreement of the parties*).

2351-83-R: Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Roofmart (Ontario) Limited, (Respondent).

Unit: “all employees of the respondent in Ottawa, Ontario, save and except foreman, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (3 employees in unit). (*Having regard to the agreement of the parties*).

2360-83-R: The United Association of Journeyman and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 508, (Applicant) v. 5151112 Ontario Limited c.o.b. as Bluebird Construction, (Respondent).

Unit #1: “all plumbers and plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in unit).

Unit #2: “all plumbers and plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in unit).

2382-83-R: Labourers’ International Union of North America, Local 527, (Applicant) v. Antagon Construction Ltd., (Respondent).

Unit #1: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

Unit #2: “all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

1746-83-R: Teamsters Union Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Clarke Transport Canada Inc., (Respondent) v. Canadian Brotherhood of Railway, Transport & Gen. Workers, (Intervener).

Unit: “all employees of the respondent at its pool car terminal in Mimico, Ontario, save and except foremen, persons above the rank of foreman, office staff, and students employed for the school vacation period.” (70 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters’ list		73
Number of persons who cast ballots	55	
Number of ballots marked in favour of applicant		37
Number of ballots marked in favour of intervener		18

1875-83-R: International Union of Operating Engineers, Local 796, (Applicant) v. Queensway-Carleton Hospital, (Respondent) v. Canadian Union of Operating Engineers and General Workers, (Intervener).

Unit: "all stationary engineers employed by the respondent in the power house (Queensway-Carleton Hospital, 3045 Baseline Road, Ottawa) save and except chief engineer and those above the rank of chief engineer." (5 employees in unit).

Number of names of persons on list as originally prepared		5
Number of persons who cast ballots	4	
Number of ballots marked in favour of applicant		4
Number of ballots marked in favour of intervener		0

2026-83-R: Teamsters Local Union 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Silknit Limited, (Respondent) v. United Textile Workers of America, (Intervener).

Unit: "all employees of the respondent at Milton, save and except foremen, persons above the rank of foreman, office and clerical employees, watchmen, and guards." (255 employees in unit).

Number of names of persons on revised voters' list		184
Number of persons who cast ballots	184	
Number of spoiled ballots		5
Number of ballots marked in favour of applicant		103
Number of ballots marked in favour of intervener		76

2128-83-R: Energy and Chemical Workers Union, CLC, (Applicant) v. Doughty Concrete Products Limited, (Respondent) v. United Cement, Lime, Gypsum and Allied Workers International Union, AFL, CIO, CLC, (Intervener).

Unit: "all employees of the respondent at its plant in the Township of Smith, save and except foremen and dispatcher, persons above the rank of foreman and dispatcher, office and sales staff, and students employed during the school vacation period." (24 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared		7
Number of persons who cast ballots	7	
Number of ballots marked in favour of applicant		7
Number of ballots marked in favour of intervener		0

2148-83-R: Service Employees Union, Local 204, affiliated with S.E.I.U., AFL, CIO, CLC, (Applicant) v. St. Raphael's Centre Limited, (Respondent).

Unit: "all employees of the respondent in its nursing homes in Metropolitan Toronto, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except Registered Nurses, Graduate Nurses, Undergraduate Nurses, Physiotherapists, Occupational Therapists, Director of Activities, supervisors, persons above the rank of supervisor, office staff, and persons covered by subsisting collective agreements." (5 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared		7
Number of persons who cast ballots	6	
Number of ballots marked in favour of applicant		6
Number of ballots marked against applicant		0

2149-83-R: London and District Service Workers' Union, Local 220, SEIU, AFL, CIO, CLC, (Applicant) v. Woodstock General Hospital Trust, (Respondent).

Unit: “all employees of the respondent at Woodstock, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, technical personnel, supervisors, persons above the rank of supervisor, chief engineer, office staff and those persons covered by subsisting collective agreements.” (61 employees in unit).

Number of names of persons on list as originally prepared		61
Number of persons who cast ballots	38	
Number of ballots marked in favour of applicant		33
Number of ballots marked against applicant		5

2182-83-R: Canadian Paperworkers Union, (Applicant) v. CIP Daxon Inc., (Respondent) v. Teamsters’ Local 419, (Intervener).

Unit: “all employees of the respondent working at and out of Metropolitan Toronto, save and except foremen, those above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period.” (12 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared		12
Number of persons who cast ballots	12	
Number of segregated ballots cast by persons whose names do not appear on voters’ list	1	
Number of ballots marked in favour of applicant		12
Number of ballots marked in favour of intervener		0
Ballots segregated and not counted		1

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

1525-83-R: Canadian Union United Brewery, Flour, Cereal, Soft Drink and Distillery Workers Local 304, (Applicant) v. Canada Trustco Mortgage Company, (Respondent).

Unit #1: “all employees of the respondent at its Branch at 699 King Street, Cambridge, save and except teller supervisors, persons above the rank of teller supervisor, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (12 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared		8
Number of persons who cast ballots	7	
Number of ballots marked in favour of applicant		4
Number of ballots marked against applicant		3

Unit #2: (*See Bargaining Agents Certified – No Vote Conducted*).

2055-83-R: Canadian Union of Public Employees, (Applicant) v. Sudbury Hospital Services Limited, (Respondent) v. International Union of Operating Engineers, Local 796, (Intervener).

Unit: “all employees of the respondent save and except foremen, those above the rank of foreman and office staff.” (41 employees in unit).

Number of names of persons on list as originally prepared		41
Number of persons who cast ballots	36	
Number of ballots marked in favour of applicant		32
Number of ballots marked in favour of intervener		4

Applications for Certification Dismissed – No Vote Conducted

0980-83-R: United Brotherhood of Carpenters and Joiners of America, Local 446, (Applicant) v. Wardet Limited, (Respondent) v. Labourers' International Union of North America, Ontario Provincial District Council, (Intervener).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Board's geographic area no. 21, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in unit).

1653-83-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada Local 508, (Applicant) v. Twin City Mechanical, (Respondent). (3 employees in unit).

2107-83-R: Canadian Union of Operating Engineers and General Workers, (Applicant) v. The Regional Municipality of Halton, (Respondent) v. The Canadian Union of Public Employees, (Intervener). (225 employees in unit).

2146-83-R: The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 508, (Applicant) v. 5151112 Ontario Limited c.o.b. as Bluebird Construction, (Respondent). (5 employees in unit).

2166-83-R: Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Hamilton Automobile Club, (Respondent) v. Group of Employees, (Objectors). (105 employees in unit).

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

2027-83-R: Energy and Chemical Workers Union, CLC, (Applicant) v. Lake Ontario Cement Limited, (Respondent) v. United Cement, Lime, Gypsum and Allied Workers International Union, AFL, CIO, CLC, (Intervener).

Unit: "all maintenance and production employees of the respondent at its plant and quarry in the Township of Sophiasburg and the packhouse at 312 Cherry Street, Toronto, Ontario, save and except foremen, persons above the rank of foreman, office and clerical personnel and security guards." (262 employees in unit).

Number of names of persons on list as originally prepared		253
Number of persons who cast ballots	191	
Number of ballots excluding segregated ballots cast by persons whose name appear on voters' list	182	
Number of ballots marked in favour of applicant		50
Number of ballots marked in favour of intervener		132
Ballots segregated and not counted		9

2183-83-R: Canadian Paperworkers Union, (Applicant) v. CIP Dixon Inc., (Respondent).

Unit: "all employees of the Respondent at Mississauga, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (4 employees in unit).

Number of names of persons on list as originally prepared		4
Number of persons who cast ballots	4	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		1
Number of ballots marked against applicant		2

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

1383-83-R: United Steelworkers of America, (Applicant) v. Sanivan Ontario Inc., Sanivan Inc., (Respondents) v. International Union of Operating Engineers, Local Local 793, (Intervener #1) v. International Brotherhood of Painters and Allied Trades and the Ontario Council of the International Brotherhood of Painters and Allied Trades, (Intervener #2).

Unit: "all employees of the respondent working within the geographic area bounded by Lake Ontario, Trafalgar Road north to Highway 5, west along Highway 5 to Highway 52, south of Highway 52 to the Wentworth County Line, along southeastward on the Wentworth County Line to 50 road along 50 road to Lake Ontario, save and except foremen, persons above the rank of foreman and persons covered by subsisting collective agreements between Sanivan Inc. and the International Brotherhood of Painters and Allied Trades and the Ontario Council of the International Brotherhood of Painters and Allied Trades acknowledged by all parties to be binding upon Sanivan Ontario Inc. ('the Painters Agreement')." (62 employees in unit). (*Clarity Note*).

Number of names of persons on list as originally prepared		14
Number of persons who cast ballots	10	
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	10	
Number of ballots marked in favour of applicant		3
Number of ballots marked in favour of intervener		7

1500-83-R: United Electrical, Radio and Machine Workers of America (UE), (Applicant) v. Tektron Equipment Corporation, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of Tektron Equipment Corporation in Stoney Creek, Ontario, save and except supervisors, and those above the rank of supervisor, office and sales staff." (29 employees in unit).

Number of names of persons on list as originally prepared		23
Number of persons who cast ballots	22	
Number of ballots excluding segregated ballots cast by persons whose name appear on voters' list	19	
Number of ballots marked in favour of applicant		7
Number of ballots marked against applicant		12
Ballots segregated and not counted		3

1588-83-R: Laundry & Linen Drivers and Industrial Workers Union Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Everest & Jennings Canadian Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent employed at its plant at Concord, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, engineering and technical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (112 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		107
Number of persons who cast ballots	104	
Number of spoiled ballots		3
Number of ballots marked in favour of applicant		44
Number of ballots marked against applicant		57

1967-83-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Applicant) v. Modern Mold Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Windsor, Ontario, save and except foremen, those above the rank of foreman, office and sales staff." (21 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared		21
Number of persons who cast ballots	21	
Number of ballots excluding segregated ballots cast by persons whose name appear on voters' list	20	
Number of ballots marked in favour of applicant		7
Number of ballots marked against applicant		13
Ballots segregated and not counted		1

2052-83-R: Service Employees Union, Local 478, (Applicant) v. St. Joseph's College and Mother-house, (Respondent).

Unit: "all employees of the respondent in the City of North Bay, Ontario regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors and foremen, persons above the rank of supervisor and foreman, members of the Congregation of the Sisters of St. Joseph, teaching and office staff, and persons covered by a subsisting collective agreement." (14 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared		14
Number of persons who cast ballots	14	
Number of ballots marked in favour of applicant		
Number of ballots marked against applicant		7

APPLICATIONS FOR CERTIFICATION WITHDRAWN

1427-83-R: Labourers' International Union of North America, Local 506, (Applicant) v. Far North Construction Company Ltd., (Respondent) v. Construction Workers Local No. 6 (affiliated with the Christian Labour Association of Canada). (Intervener).

1526-83-R: Labourers' International Union of North America, Local 183, (Applicant) v. Ellis-Don Limited, (Respondent).

1768-83-R: Labourers' International Union of North America, Local 1059, (Applicant) v. N. Piccoli Construction Ltd., (Respondent) v. Group of Employees, (Objectors).

1986-83-R: United Brotherhood of Carpenters and Joiners of America, Local 2486, (Applicant) v. Davony Drywall Limited, (Respondent).

2140-83-R: United Food & Commercial Workers International Union, Local 725, (Applicant) v. Wheels Inn, Chatham, (Respondent).

2189-83-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters' and Joiners of America, (Applicant) v. George Wimpey of Canada Limited, (Respondent) v. Labourers' International Union of North America, Ontario Provincial District Council, (Intervener #1) v. Labourers' International Union of North America, Local 183, (Intervener #2).

2314-83-R: The Canadian Union of Public Employees, (Applicant) v. The Doctor's Hospital (Toronto), (Respondent).

2321-83-R: United Food & Commercial Workers International Union, Local 175, (Applicant) v. Joannis I.G.A., (Respondent).

2335-83-R: Service Employees International Union, (Applicant) v. C.N.I.B. Caterplan Services, (Respondent).

2365-83-R: Hotel Employees Restaurant Employees Union, Local 75, (Applicant) v. Embassy Hotel, (Respondent).

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

0200-83-R: Resilient Floorworkers, Local 2965, (Applicant) v. Perfection Rug Co. Ltd. and Condor Carpet Mills Ltd. – La Manufacture de Tapis Condor Ltee., (Respondents). (*Withdrawn*).

1498-83-R: The Labourers' International Union of North America, Local 1081, (Applicant) v. Doug Wright Construction Limited D.M.L. Construction Supplies Inc., (Respondents). (*Granted*).

1647-83-R: Toronto-Central Ontario Building and Construction Trades Council on its own behalf and on behalf of its affiliates, (Applicant) v. United Shelters Ltd. c.o.b. as Lisgar Construction Company Limited, Known Construction Company Limited, 281981 Ontario Limited c.o.b. as Sola Developments Co., and Far North Construction Company Ltd., (Respondents) v. Construction Workers Local No. 6 (affiliated with the Christian Labour Association of Canada), (Intervener). (*Granted*).

1985-83-R: United Brotherhood of Carpenters and Joiners of America, Local 2486, (Applicant) v. Davony Drywall Limited, Grossi Bros. Limited and Niagara Drywall Limited, (Respondents). (*Granted*).

2009-83-R: Energy and Chemical Workers Union, (Applicant) v. Engelhard Industries of Canada Ltd., (Respondent). (*Withdrawn*).

2042-83-R: International Brotherhood of Boilermakers' Local Union 128, (Applicant) v. Vacuum Anchor Corporation, VAC Services, Division of 464555 Ontario Limited, (Respondents). (*Granted*).

SALE OF A BUSINESS

1498-83-R: The Labourers' International Union of North America, Local 1081, (Applicant) v. Doug Wright Construction Limited D.M.L. Construction Supplies Inc., (Respondents). (*Granted*).

1647-83-R: Toronto-Central Ontario Building and Construction Trades Council on its own behalf and on behalf of its affiliates, (Applicant) v. United Shelters Ltd. c.o.b. as Lisgar Construction Company Limited, Known Construction Limited, 281981 Ontario Limited c.o.b. as Sola Developments Co., and Far North Construction Company Ltd., (Respondents) v. Construction Workers Local No. 6, (affiliated with the Christian Labour Association of Canada), (Intervener). (*Withdrawn*).

2041-83-R: International Brotherhood of Boilermakers' Local Union 128, (Applicant) v. Vacuum Anchor Corporation, VAC Services, Division of 464555 Ontario Limited, (Respondents). (*Dismissed*).

2073-83-R: International Beverage Dispensers and Bartenders Union, Local 280, (Applicant) v. Blondie's Entertainment Ltd., (c.o.b. as Blondie's Tavern), (Respondents). (*Granted*).

2250-83-R: Employees Association Computing Devices Company, (Applicant) v. Paton Industries, (Respondent). (*Withdrawn*).

UNION SUCCESSOR STATUS

2278-83-R: Graphic Communications International Union, Local 500-M, Toronto, (Applicant) v. Colourgraph Reproduction Systems Inc., (Respondent). (*Granted*).

2279-83-R: Graphic Communications International Union, Local 500-M, Toronto, (Applicant) v. Thistle Printing, (Respondent). (*Granted*).

2361-83-R: United Steelworkers of America, (Applicant) v. American Can Canada Inc., (Respondent). (*Granted*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1346-83-R: Susan Flewelling, on her behalf and on behalf of a group of employees, (Applicant) v. United Steelworkers of America, (Respondent) v. Crock & Block Restaurant, (Intervener).

Unit: "all employees of Crock & Block Restaurant at Burlington, save and except assistant managers, persons above the rank of assistant manager, management trainees, kitchen supervisors and dining room supervisors." (39 employees in unit). (*Dismissed*).

Number of names of persons on list as originally prepared		41
Number of persons who cast ballots	38	
Number of ballots marked in favour of respondent		20
Number of ballots marked against respondent		17
Ballots segregated and not counted		1

1506-83-R: M. A. Sample, (Applicant) v. Teamsters Union, Local 91, (Respondent) v. Ottawa Commercial Realities Limited, (Intervener) v. Group of Employees, (Objectors).

Unit: "all employees of Ottawa Commercial Realities Limited working at Ottawa, Ontario, save and except supervisors, those above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty (20) hours per week, and students employed during the school vacation period." (2 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared		12
Number of persons who cast ballots	12	
Number of ballots excluding segregated ballots cast by persons whose name appear on voters' list	12	
Number of ballots marked in favour of respondent		5
Number of ballots marked against respondent		7

1516-83-R: Ken Price, on his own behalf and on behalf of a Group of Employees, (Applicant) v. Shopmen's Local Union No. 834 of the International Association of Bridge Structural and Ornamental Iron Workers, (Respondent) v. Empco-Fab Ltd., (Intervener).

Unit: "all employees of Empco-Fab Ltd. at Whitby, Ontario, save and except foremen, persons above the rank of foreman, office and clerical staff, draftsmen, watchmen, guards and persons engaged in field fabrication work." (12 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared		13
Number of persons who cast ballots	11	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		10
Ballots segregated and not counted		1

1679-83-R: Herbert Clark, George Biesma et al, (Applicant) v. United Steelworkers of America, (Respondent) v. Lilo Rail of Canada Limited and Modern Plating Limited, (Intervener). (73 employees in unit). (*Dismissed*).

1680-83-R: Chris Rantanen, (Applicant) v. Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers and its Local Union No. 387, (Respondent) v. Star Bottling Works Limited, (Intervener).

Unit: "all employees of the Company at Sudbury, Ontario, save and except foremen, persons above the rank of foreman, office staff and students hired for school vacation periods on November 28, 1983." (31 employees in unit). (*Granted*).

Number of names of persons on revised voters' list		33
Number of persons who cast ballots	33	
Number of ballots marked in favour of respondent		1
Number of ballots marked against respondent		31

1724-83-R: Cathy Logan, (Applicant) v. Union of Bank Employees (Ontario), Local 2104 of the Canadian Labour Congress, (Respondent) v. Valley Savings (Renfrew County) Credit Union Inc., (Intervener).

Unit: "all employees of the intervener at its Deep River Branch Office, save and except manager, office manager, management trainee, receptionist typist, and persons regularly employed for not more than twenty-four (24) hours per week." (13 employees in unit). (*Granted*).

Number of persons on list as originally prepared		9
Number of persons who cast ballots	9	
Number of ballots marked in favour of respondent		2
Number of ballots marked against respondent		7

1739-83-R: Dora Warren, (Applicant) v. Retail Clerks Union, Local 409, (Respondent) v. Dryden Truck Stop Inc., (Intervener).

Unit: "all employees employed by Dryden Truck Stop Inc. in its petroleum service station at Dryden, Ontario, save and except the service station manager, office manager, and those above those ranks." (10 employees in unit). (*Granted*).

Number of names of persons on revised voters' list		8
Number of persons who cast ballots	8	
Number of ballots marked in favour of respondent		2
Number of ballots marked against respondent		6

1830-83-R: Norma Leet, (Applicant) v. Ontario Nurses' Association, (Respondent) v. Regional Municipality of Peel, (Intervener).

Unit: "all nurses employed in a nursing capacity by the Board of Health of the Regional Municipality of Peel, save and except assistant supervisor of nurses and persons above the rank of assistant supervisor of nurses." (110 employees in unit). (*Granted*).

Number of names of persons on revised voters' list		107
Number of persons who cast ballots	81	
Number of ballots marked in favour of respondent		1
Number of ballots marked against respondent		80

1880-83-R: Crothall Employees Ongwanada Hospital Penrose Div. 752 King St. W. Kingston Ont., (Applicant) v. Canadian Union of Public Employees, (Respondent) v. Crothall Services Limited, (Intervener) v. Employee, (Objector). (13 employees in unit). (*Dismissed*).

1952-83-R: Wayne Aultman and Fred Evans, (Applicants) v. Labourers' International Union of North America, Local 183, (Respondent).

Unit: "all employees of Peel Condominium Corporation No. 143 at 3025 Credit Woodland, Mississauga, Ontario, including resident superintendents, maintenance employees, general handymen, janitorial and cleaning staff, save and except property managers, office and clerical staff." (57 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared		2
Number of persons who cast ballots	2	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		2

1978-83-R: Joanne (Rapattoni) Cartmell, (Applicant) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Respondent) v. Manor Cleaners Limited, (Intervener).

Unit: "all employees of the intervener in the City of St. Catharines, Ontario, save and except foreladies or foremen, persons above the rank of foreladies and foremen, clerical staff, drivers, students employed during the school vacation period and persons regularly employed for not more than 24 hours per week." (20 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared		19
Number of persons who cast ballots	19	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		19

1993-83-R: Andy Jacobson/Greg Wilson, (Applicant) v. Ontario Public Service Employees Union, (Respondent) v. Brant County Ambulance Service, (Intervener).

Unit: "all employees of Brant County Ambulance Service Limited at Brantford, Ontario, save and except supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period." (17 employees in unit). (*Granted*).

Number of names of persons on revised voters' list		10
Number of persons who cast ballots	8	
Number of ballots marked in favour of respondent		1
Number of ballots marked against respondent		7

2002-83-R: Marc Dallaire, (Applicant) v. Lumber & Sawmill Workers' Union, Local 2995 of the United Brotherhood of Carpenters and Joiners of America, (Respondent) v. Bois A. Lachance Lumber Limited, (Intervener). (18 employees in unit). (*Dismissed*).

2015-83-R: Louis Balaban, (Applicant) v. Labourers' International Union of North America, Local 183, (Respondent) v. York Condominium Corporation No. 301, (Intervener). (1 employee in unit). (*Granted*).

2019-83-R: A. Ahmed Burtally, (Applicant) v. Faswoc Food and Service Workers of Canada, (Respondent) v. Royal Bank Plaza Restaurants, Bernard Fromet de Rosnay, (Intervener). (49 employees in unit). (*Dismissed*).

2075-83-R: Nicola Trentini, (Applicant) v. Service Employees Union, Local 204, (Respondent). (2 employees in unit). (*Granted*).

2153-83-R: Saveway Building Supplies Limited, (Applicant) v. Retail, Wholesale and Department Store Union, Local 582, (Respondent).

Unit: "all employees employed by Saveway Building Supplies Limited at its store in Sault Ste. Marie, Ontario, save and except Yard Foreman, persons above the rank of Yard Foreman, students employed during the school vacation period and persons regularly employed for not more than twenty-four (24) hours per week." (5 employees in unit). (*Granted*).

2168-83-R: George Maxwell, (Applicant) v. United Electrical, Radio and Machine Workers of America (UE) and its Local 517, (Respondent). (8 employees in unit). (*Dismissed*).

2203-83-R: Arthur Seminara, (Applicant) v. United Food and Commercial Workers' International Union Local 1000A, AFL, CIO, CLC, (Respondent). (40 employees in unit). (*Granted*).

2204-83-R: Charles Adamo, (Applicant) v. United Food and Commercial Workers International Union Local 1000A, AFL, CIO, CLC, (Respondent).

Unit: "all employees of Keele-Wilson Supermarket Limited c.o.b. as Tops Food Market in Brampton, Ontario regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except department managers, head cashiers, persons above the rank of department manager and head cashier, and office staff." (50 employees in unit). (*Granted*).

2205-83-R: Geiuseppe Amello, (Applicant) v. Mount Nemo Truckers, Local 566, Affiliates of the United Cement, Lime, Gypsum and Allied Workers International Union, AFL, CIO, CLC, (Respondent).

Unit: "all employees of Nelson Crushed Stone engaged as truckers working at or out of the quarry of Nelson Crushed Stone at Burlington, Ontario, save and except dispatcher, persons above the rank of dispatcher, office and sales staff, security guards, and persons represented by subsisting collective agreements." (31 employees in unit). (*Granted*).

2252-83-R: Steven Forkes, (Applicant) v. Ontario Public Service Employees Union, (Respondent).

Unit: "all persons employed by the Children's Aid Society of the County of Lennox and Addington in the County of Lennox and Addington, save and except Executive Director, supervisor and persons above the rank of supervisor and secretary to the Executive Director." (19 employees in unit). (*Granted*).

2295-83-R: J. S. H. Mueller Limited, (Applicant) v. International Brotherhood of Electrical Workers, Local 594, (Respondent). (4 employees in unit). (*Withdrawn*).

REFERRAL AS TO APPOINTMENT OF CONCILIATION OFFICER

1603-83-M: Metropolitan Toronto Apartment Builders Association, (The Association) v. The Toronto Central-Ontario Building and Construction Trades Council, (The Council). (*Withdrawn*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

2316-83-U: International Harvester Canada Limited, (Applicant) v. Employees of the Applicant Listed on Appendix "A" and others, (Respondent). (*Granted*).

2317-83-U: International Harvester Canada Limited, (Applicant) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 127, and Officers of the Union as listed in Appendix "A" and Appendix "B", (Respondent). (*Granted*).

2318-83-U: International Harvester Canada Limited, (Applicant) v. Jacques Caouette, Richard Scaman, Wayne Ashton, Harry Aartsen and others, (Respondent). (*Dismissed*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

2329-83-U: Alpha Developments (A Division of 441262 Ontario Limited), (Applicant) v. The Toronto Central Ontario Building and Construction Trades Council, Daniel Ryan, and Alfred Gilbert, (Respondents). (*Withdrawn*).

COMPLAINTS OF UNFAIR LABOUR PRACTICE

0064-83-U: John Cooper, (Complainant) v. International Brotherhood of Painters and Allied Trades, Local 1590, and Ronald Last, (Respondents). (*Dismissed*).

0109-83-U: Retail Clerks Union, Local 409, (Complainant) v. White Otter Inn Limited, (Respondent). (*Withdrawn*).

0157-83-U: United Brotherhood of Carpenters and Joiners of America, Local 18, (Complainant) v. Bono General Construction Ltd., and Labourers International Union of North America Local 837, (Respondent). (*Withdrawn*).

0251-83-U: Retail Clerks Union, Local 409, (Complainant) v. White Otter Inn Limited, (Respondent). (*Withdrawn*).

0308-83-U: Byron Carter, (Complainant) v. International Federation of Professional & Technical Engineers - Local 166, and Canadian General Electric Company Limited, (Respondents). (*Dismissed*).

0575-83-U: Retail Clerks Union, Local 409, (Complainant) v. White Otter Inn Limited, (Respondent). (*Withdrawn*).

0577-83-U: Office & Professional Employees International Union, Local 343, (Complainant) v. Buntin Reid Paper, Division of Domtar Inc., (Respondent). (*Dismissed*).

1077-83-U: D. R. McCormick Electric Ltd. and Great Lakes Forest Products Limited, (Complainants) v. Mikko Vesa, Ron Pruys and Garrett Kruger, (Respondents). (*Granted*).

1278-83-U: Baldev Mutta, (Complainant) v. United Steelworkers of America, Local 7155, (Respondent) v. Waterloo Metal Stampings Ltd., (Intervener). (*Dismissed*).

1316-83-U: Gerald John Thomas Pearson, (Complainant) v. Newman Harbour Terminals & Transportation Inc., carrying on business as N.T. & T. Inc. and Lakespan Shipping Ltd., (Respondents). (*Granted*).

1367-83-U: William Shaver, (Complainant) v. Lakespan Shipping, N.T.& T. Inc., Contrast Shipping and Terramar, (Respondents). (*Dismissed*).

1401-83-U; 1402-83-U: Retail Clerks Union, Local 409, (Complainant) v. White Otter Inn Limited, (Respondent). (*Withdrawn*).

1521-83-U: Ontario Nurses' Association, (Complainant) v. Brantwood Manor Nursing Homes Limited, (Respondent). (*Withdrawn*).

1563-83-U: Paul Ramanaskas and other employees of Merit Paper & Bag Co. Ltd. as listed on Schedule "A", (Complainant) v. Region No. 2, International Woodworkers of America, (Respondent). (*Withdrawn*).

1599-83-U: Peter Winston Woolley, (Complainant) v. United Automobile, Aerospace and Agricultural Implement Workers of America, Local 1520, and Ford Motor Company of Canada, Limited, (Respondents). (*Dismissed*).

1648-83-U: Toronto-Central Ontario Building and Construction Trades Council on its own behalf and on behalf of its affiliates, (Complainant) v. United Shelters Ltd. c.o.b. as Lisgar Construction Company Limited, Known Construction Company Limited, 281981 Ontario Limited c.o.b. as Sola Developments Co., Far North Construction Company Ltd., (Respondents). (*Withdrawn*).

1672-83-U: David Cirka, (Complainant) v. Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers C.L.C. Local 325 Etobicoke, (Respondent) v. Carling O'Keefe Breweries of Canada Ltd., (Intervener). (*Dismissed*).

1807-83-U: Retail Clerks Union, Local 409, (Complainant) v. Canada Safeway Limited, (Respondent). (*Withdrawn*).

1844-83-U; 1890-83-U; 1927-83-U: United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Complainant) v. Petro Chem Plastics Incorporated, (Respondent). (*Withdrawn*).

1934-83-U: Nipissing Independent Union, (Complainant) v. Du Pont Canada Inc., (Respondent). (*Withdrawn*).

1945-83-U: Ontario Nurses' Association, (Complainant) v. Vernon Nursing Home Services Limited, (Fairvern Nursing Home), (Respondent). (*Withdrawn*).

2018-83-U: Zafar Islam, Ralph Strickland and Babular Shah, (Complainants) v. United Textile Workers of America, (Respondent). (*Withdrawn*).

2043-83-U: International Brotherhood of Boilermakers' Local 128, (Complainant) v. Vacuum Anchor Corporation, VAC Services, Division of 464555 Ontario Limited, (Respondents). (*Dismissed*).

2059-83-U: Utility Workers of Canada, Unit #1, (Complainant) v. Pickering Hydro-Electric Commission, (Respondent). (*Withdrawn*).

2080-83-U: Ronald F. Wehrle, (Complainant) v. United Steelworkers of America, Local 2894, (Respondent). (*Withdrawn*).

2092-83-U: United Brotherhood of Carpenters and Joiners of America, Local 1669, (Complainant) v. Norcan Developments Limited, (Respondent). (*Withdrawn*).

2093-83-U: Teamsters Local Union 230, (Complainant) v. John Ziner Lumber Ltd., (Respondent). (*Withdrawn*).

2104-83-U: Zafar Islam and Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainants) v. Silknit Limited, (Respondent). (*Withdrawn*).

2122-83-U: Richard Bell et al, (Complainants) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 71, (Respondent). (*Withdrawn*).

2123-83-U: John Maruszak, (Complainant) v. The United Steel Workers of America, Local 2835, (Respondent). (*Withdrawn*).

2124-83-U; 2125-83-U: Energy and Chemical Workers Union, (Complainant) v. Southern Wood Products Limited, (Respondent). (*Withdrawn*).

2152-83-U: Gordon Finch & Ken Jongeneelen, (Complainants) v. Adrian Jomgeneelen – President Local 242 AF of Grain Millers, (Respondent). (*Withdrawn*).

2177-83-U: Captain, Ernst Albrecht Hein, (Complainant) v. The Toronto Harbour Commission and C.U.P.E., Local 186, (Respondent). (*Withdrawn*).

2195-83-U: Ronald Lewszoniuk, (Complainant) v. International Union of Operating Engineers Local 793, (Respondent). (*Dismissed*).

2198-83-U: James "David" Johnson, (Complainant) v. The International Association of Bridge, Structural and Ornamental Ironworkers, Local Union 721, Allan MacIsaac, John Donaldson and J. Brabek, (Respondents). (*Withdrawn*).

2206-83-U: Ontario Public Service Employees Union, (Complainant) v. Clinic Funding Committee, Roger D. Yachetti, Q.C., Hugh Guthrie, Q.C., Glenn Carter, Douglas Ewart, Berta Zaccardi, Thomas G. Bastedo, Q.C., and the Law Society of Upper Canada, (Respondents). (*Withdrawn*).

2209-83-U: United Steelworkers of America, (Complainant) v. Electrolux Canada, Division of Consolidated Foods Corporation Canada Ltd., (Respondent). (*Withdrawn*).

2210-83-U: Gary Snelgrove, (Complainant) v. United Brotherhood of Carpenters and Joiners of America, Local 27, (Respondent). (*Withdrawn*).

2243-83-U: Don Mercer, (Complainant) v. Employees Association, (Respondent). (*Withdrawn*).

2261-83-U: William Kowalchuk, (Complainant) v. Hotel, Employees Restaurant Employees Union, Local 75, (Respondent). (*Withdrawn*).

2272-83-U: Roger Broadbent, (Complainant) v. Crothers Limited, (Respondent). (*Withdrawn*).

2338-83-U: Hotels, Clubs, Restaurants & Tavern Employees' Union Local 261, (Complainant) v. Sam Birnbaum, (Respondent). (*Withdrawn*).

2339-83-U: Hotels, Clubs, Restaurants and Tavern Employees' Union Local 261, (Complainant) v. Sam Birnbaum and the Windsor House Tavern, (Respondent). (*Withdrawn*).

2364-83-U: H. Gresel Shipper-Receiver-Storeman at St. Lawrence Cement Inc., (Complainant) v. United Cement Lime and Gypsum Workers International Union AFL, CIO, CLC, Local 366, (Respondent). (*Withdrawn*).

2367-83-U: The Corporation of the City of Sudbury, (Complainant) v. Canadian Union of Public Employees, Local 1662, (Respondent). (*Withdrawn*).

APPLICATIONS FOR RELIGIOUS EXEMPTION

2214-83-M: Ruth D. Scott, (Applicant) v. The Ontario Public Service Employees Union, (Respondent Trade Union) v. Norfolk Board of Education, (Respondent Employer). (*Dismissed*).

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

2144-83-M: United Electrical, Radio & Machine Workers of America, Local 542, (Trade Union) v. The Diebold Company of Canada Limited & Chubb Security Safes, A Division of Chubb Industries Limited, (Employers). (*Granted*).

2260-83-M: Glove Reconditioners, A Division of Canadian Linen Supply, (Employer) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (formerly Laundry, Dry Cleaning and Dye House Workers' International Union, Local 351), (Trade Union). (*Granted*).

JURISDICTIONAL DISPUTES

0171-83-JD: The Printing and Graphic Communications Union (Newspaper Local N-1), (Complainant) v. Graphic Arts International Union (Local 211) and Southam Printing Limited (Southam-Murray Division), (Respondents). (*Dismissed*).

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

0984-83-M: Wellesley Hospital, (Applicant) v. Service Employees International Union, (Respondent). (*Withdrawn*).

1076-83-M: The Corporation of the City of Thunder Bay, (Applicant) v. Canadian Union of Public Employees Local 87, (Respondent). (*Granted*).

1213-83-M: The Canadian Union of Public Employees, (Applicant) v. The Corporation of the Town of Deep River, (Respondent). (*Withdrawn*).

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

2138-83-OH: Dane Parks, (Complainant) v. Don J. Gillman, Arenas Superintendent, and the Corporation of the Town of Cobourg, (Respondent). (*Withdrawn*).

2192-83-OH: Mohammed Rahman, (Complainant) v. Leonard Miles, Supervisor, Norman Blondeau, Distribution Manager, West Bend of Canada, (Respondents). (*Withdrawn*).

2199-83-OH: John Neverson, (Complainant) v. Hy-Power Coatings Ltd., (Respondent). (*Withdrawn*).

2375-83-OH: William Douglas, (Complainant) v. Humber College, (Respondent). (*Withdrawn*).

2393-83-OH: Paul Williamson, Ken Bryce, Melvin Eisthen, Martyn Gillott, O. Sharma, (Complainants) v. Firestone Canada Inc., (Respondent). (*Withdrawn*).

CONSTRUCTION INDUSTRY GRIEVANCES

1556-82-M: The Toronto-Central Ontario Building and Construction Trades Council on its own behalf and on behalf of The International Association of Heat and Frost Insulators, Local 95; The Marble, Tile and Terrazzo Workers Union, Local 31; The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46; and The Labourers' International Union of North America, Local 506, (Applicants) v. M. J. Guthrie Construction Limited and Rosedale Construction, (Respondents). (*Granted*).

2607-82-M: Labourers' International Union of North America, Local 247, (Applicant) v. Plibrico (Canada) Limited, (Respondent). (*Dismissed*).

0099-83-M: United Brotherhood of Carpenters and Joiners of America, Local 2486, (Applicant) v. E. S. Fox Limited, (Respondent). (*Withdrawn*).

0201-83-M: Resilient Floorworkers, Local Union 2965, (Applicant) v. Perfection Rug Co. Ltd. and Condor Carpet Mills Ltd. – La Manufacture de Tapis Condor Ltee., (Respondents). (*Withdrawn*).

1282-83-M: The Formwork Council of Ontario, (Applicant) v. Etrusca Construction Limited, (Respondent). (*Granted*).

1462-83-M: International Union of Operating Engineers, Local 793, (Applicant) v. Petrex Leasing Limited, (Respondent). (*Withdrawn*).

1659-83-M: Labourers International Union of North America, Local 607, (Applicant) v. Rino Zanette Limited, Rino Zanette (1981) Ltd., (Respondents). (*Granted*).

1669-83-M: Ontario Allied Construction Trades Council, United Brotherhood of Carpenters and Joiners of America Lake Ontario District Council, (Applicant) v. The Electrical Power Systems Construction Association of Ontario Hydro, (Respondent). (*Withdrawn*).

1850-83-M: Labourers' International Union of North America, Ontario Provincial District Council and Labourers International Union of North America, Local 183, (Applicant) v. Ellis Don Limited, (Respondent). (*Withdrawn*).

1888-83-M: Local 200 of the Ontario Council of the International Brotherhood of Painters and Allied Trades, (Applicant) v. Frederick Grodde Ltd., (Respondent). (*Granted*).

1963-83-M: Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada, (Applicant) v. P & R Concrete Finishing Co., a division of 361870 Ontario Limited, (Respondent). (*Granted*).

2067-83-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Ferracon Construction Ltd., (Respondent). (*Granted*).

2069-83-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Monaco General Interior Contractors Inc., (Respondent). (*Granted*).

2082-83-M: International Brotherhood of Painters and Allied Trades, Local 205, (Applicant) v. J. Stevens Enterprises Limited and 425638 Ontario Inc., carrying on business as Skyway Sandblasting and Painting, (Respondents). (*Granted*).

2088-83-M: Toronto-Central Ontario Building Trades Council on its own behalf and on behalf of its affiliates, (Applicant) v. United Shelters Ltd. c.o.b. as Lisgar Construction Company Limited, 281981 Ontario Limited c.o.b. as Sola Developments Co., Known Construction Company Limited and Far North Construction Company Ltd., (Respondents). (*Withdrawn*).

2126-83-M: Local Union 2965, Resilient Floorworkers, U.B.C.J.A., (Applicant) v. Perfection Rug Co. Ltd., (Respondent). (*Granted*).

2135-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Flag Construction, (Respondent). (*Withdrawn*).

2137-83-M: United Brotherhood of Carpenters & Joiners of America, Local 18, (Applicant) v. Lee-wood Industries, (Respondent). (*Withdrawn*).

2179-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Black & McDonald Limited, (Respondent). (*Withdrawn*).

2180-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Black & McDonald Limited, (Respondent). (*Withdrawn*).

2186-83-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 599, (Applicant) v. Erik Fabricius, carrying on business as North Mechanical, 568295 Ontario Limited c.o.b. as North Mechanical, (Respondent). (*Granted*).

2191-83-M: United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. Jims Construction, (Respondent). (*Withdrawn*).

211-83-M: International Association of Bridge, Structural and Ornamental Iron Workers, Local Union No. 736, (Applicant) v. Daniel Steel Installation Ltd., (Respondent). (*Granted*).

2219-83-M: International Union of Operating Engineers, Local 793, (Applicant) v. Mar-San Excavating & Grading Limited, (Respondent). (*Withdrawn*).

2229-83-M: Sheet Metal Workers' International Association, Local Union 504, (Applicant) v. A. Kenagy Heating and Ventilating Limited, (Respondent). (*Withdrawn*).

2245-83-M; 2246-83-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. Thornhill Mechanical Ltd., (Respondent). (*Withdrawn*).

2247-83-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. J. B. Mechanical, (Respondent). (*Withdrawn*).

2248-83-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. Clay Bradshaw Inc., (Respondent). (*Granted*).

2249-83-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. Denney Brothers Ltd., (Respondent). (*Withdrawn*).

2264-83-M: Drywall, Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Alden Interiors, (Respondent). (*Withdrawn*).

2265-83-M: Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. 554700 Ontario Limited carrying on business as L.O.E.D. Contractors, (Respondent). (*Withdrawn*).

2267-83-M: United Brotherhood of Carpenters and Joiners of America, Local 38, (Applicant) v. Donn-Hope Construction Ltd., (Respondent). (*Granted*).

2276-83-M: United Brotherhood of Carpenters and Joiners of America, Local 38, (Applicant) v. A. Volpatti Plastering & Construction Ltd., (Respondent). (*Granted*).

2291-83-M: Labourers' International Union of North America, Local 1059, (Applicant) v. Twin Masonry Limited, (Respondent). (*Withdrawn*).

2292-83-M: Labourers' International Union of North America, Local 506, (Applicant) v. Ferracon Construction Ltd., (Respondent). (*Granted*).

2293-83-M: International Union of Operating Engineers, Local 793, (Applicant) v. A. J. Maddix Construction Limited, (Respondent). (*Granted*).

2302-83-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Chairman Mills, (Respondent). (*Withdrawn*).

2303-83-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Suttonwood Group Inc., (Respondent). (*Withdrawn*).

2304-83-M: International Union of Operating Engineers, Local 793, (Applicant) v. Michael Brothers Excavating (operated by Royal Excavating & Grading Limited), (Respondent). (*Withdrawn*).

2307-83-M: United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. Duntri Construction, (Respondent). (*Withdrawn*).

2313-83-M: Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Muzzso Brothers Limited, carrying on business as Marel Contractors, (Respondents). (*Withdrawn*).

2331-83-M: United Brotherhood of Carpenters and Joiners of America, Local 494, (Applicant) v. Ball Brothers Limited, (Respondent). (*Withdrawn*).

2337-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Pietro Cipriano Construction Ltd., (Respondent). (*Withdrawn*).

2349-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Alm Paving Ltd., (Respondent). (*Withdrawn*).

2350-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. The Presidential Group Limited and the Presidential Group (Brookshire) Limited, (Respondent). (*Withdrawn*).

2366-83-M: United Brotherhood of Carpenters and Joiners of America, Local 1316, (Applicant) v. Niagara Drywall Limited, (Respondent). (*Granted*).

2417-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Ferpac Paving Inc., (Respondent). (*Withdrawn*).

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